85-453

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,
Petitioner

v.

CITY OF SAN ANTONIO,
Respondent

On Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

The Texas Supreme Court had, in an earlier disposition of this same case, dealing with the identical issues, facts, law, arguments and parties, denied an Application for Writ of Error filed by the City of San Antonio, Respondent in this Writ of Certiorari. This denial, thereby, upheld the decision of the Eastland Court of Appeals, in favor of eleven other school districts under the identical issues, facts, law, arguments and circumstances as those involved in this Writ of Certiorari. The Supreme Court of Texas' refusal to consider the law of the case has left two diametrically opposed decisions in place, creating unconstitutional discrimination against Petitioner due to a denial of equal protection under the law. Moreover, the action of the Supreme Court of Texas leaves intact conflicting appellate court decisions interpreting a State statute and providing seemingly legal precedent for unequal application of such statute. If this situation is not remedied by this Court, an ongoing violation of equal protection under the law will exist, not only for Petitioner, but in all future applications of this State statute.

The Texas Supreme Court has not once, *but twice*, refused n.r.e. in the same case, resulting in opposite and unequal interpretations of the same State statute. The questions then presented to this Court are as follows:

> Does the Supreme Court of Texas' refusal to hear this case raise the following constitutional issues for consideration by this Court:
>
> I. Violation of the equal protection afforded to Petitioner under the Fourteenth Amendment of the United States Constitution, denying Peti-

tioner equal treatment with other litigants in the same litigation/appellate review involving the legal determination of identical issues, facts, law, arguments and circumstances.

II. Violation of the equal protection clause in failing to apply the law of the case which now permits to stand conflicting—yet equally valid —decisions of two lower appellate courts, resulting in continuing unequal treatment under the law.

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II. The decision below violates the equal protection clause of the Fourteenth Amendment of the United States Constitution in failing to apply the law of the case which now permits to stand conflicting decisions of two lower appellate courts resulting in continuing unequal treatment under the law.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

OPINIONS BELOW

The Supreme Court of Texas denied Petitioner's Application for Writ of Error, which appears in Appendix B to this Petition, at Page 2a. In addition, the Supreme Court of Texas overruled Petitioner's Motion for Rehearing, which appears in Appendix A to this Petition, at Page 1a. This subsequently upheld the Court of Appeals', Fourth Supreme Judicial District, Bexar County, Texas, decision, which appears in Appendix C to this

Petition, at Page 3a. (This decision was decided against Petitioner and is the basis of this Writ of Certiorari).

On April 9, 1984, the Eastland Court of Appeals reversed the decision of a lower court as to a summary judgment which had been granted Respondent, City of San Antonio. The court reversed and rendered summary judgment as to all other parties (eleven other school districts), with the exception of Petitioner, San Antonio Independent School District, which had not previously filed a Motion for Summary Judgment. The case was reversed and remanded as to Petitioner, San Antonio Independent School District. The Eastland Court of Appeals held, by necessary implication and in plain effect, that the entire payment by the City Public Service Board to the City of San Antonio was a "payment in lieu of taxes", as defined in the Texas Public Utility Regulatory Act, TEX. REV. CIV. STAT. ANN. art. 1446c, which established a comprehensive regulatory system over "public utilities" in order to assure just and reasonable rates, operations, and services to consumers. The controversy from which this suit arises concerns the provisions of Section 48 of Article 1446c, *supra,* a section applying to "public utilities" under the Act and prohibiting them from including in their rates to school and hospital districts amounts paid in lieu of taxes to the municipality by which the "public utility" is owned:

> "Sec. 48. No payments made in lieu of taxes by a public utility to the municipality by which it is owned may be considered an expense of operation for the purpose of determining, fixing or regulating the rates to be charged for the provision of utility service to a school district or hospital district."

The Eastland Court of Appeals' holding, discussed *infra,* was left undisturbed by the Supreme Court of Texas when, on January 27, 1982, the City's Application for Writ of Error was denied in that case.

Subsequently, on July 7, 1982, a Motion for Summary Judgment was filed in the trial court on behalf of Petitioner, San Antonio Independent School District. The trial court, on January 14, 1983, granted the Motion for Summary Judgment filed by Petitioner. However, on November 30, 1984, the Court of Appeals, Fourth Supreme Judicial District, Bexar County, Texas, reversed the decision of the trial court and entered judgment in favor of Respondent, City of San Antonio. Next, Petitioner filed a Motion for Rehearing with the Court of Appeals, and on December 17, 1984, Petitioner, San Antonio Independent School District, filed a second Motion for Rehearing with the San Antonio Court of Appeals. On January 4, 1985, the Court of Appeals denied the Petitioner's Motion for Rehearing.

Consequently, Petitioner filed an Application for Writ of Error with the Supreme Court of Texas on January 31, 1985, which was denied on April 10, 1985. A Motion for Rehearing was filed on April 23, 1985, by Petitioner, and it was denied on June 12, 1985 by the Supreme Court of Texas.

JURISDICTION

The denial of Petitioner's Application for Writ of Error (Appendix A, *infra,* Page 1a) and Petitioner's subsequent Motion for Rehearing (Appendix B, *infra,* Page 2a) were entered on April 10, 1985, and June 12, 1985, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

It is the position of the Petitioner that the decisions of the lower State appellate and State Supreme Court are in violation of long-established principles of law and equity dealing with State decisions and law of the case. *Vendo Co. v. Lecktro-Vend Corp.,* 434 U.S. 425, 98 S. Ct. 702, 54 L.Ed.2d 659 (1978); *United States v. Fossatt,* 62 U.S. 445, 16 L.Ed. 185 (1859); *In Re: Sanford Fork & Tool Co.,* 160 U.S. 247, 255, 16 S. Ct. 291, 293, 40 L.Ed. 414 (1895). Further, to selectively treat one party in identical litigation to different results violates Federally-protected principles under a variety of Federal statutes and regulations. *Vendo Co. v. Lecktro-Vend Corp., supra; United States v. Fossatt, supra; In Re: Sanford Fork & Tool Co., supra; In Re: India Wharf Brewery, Inc.,* 96 F.2d 710 (2nd Cir. 1938); *In Re: Joslyn's Estate,* 171 F.2d 159 (7th Cir. 1948). Petitioner has legitimate standing to raise a denial of equal protection argument. In *Monell v. Dept. of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978), this Court restricted the protections of soverign immunity previously known to governmental entities under the Federal Civil Rights Act (42 U.S.C. 1983), defining a governmental entity as a "person" for Federal jurisdiction, and permitting lawsuits against such an entity as if it were an individual enjoying those rights, privileges, immunities and responsibilities under that statute. Further, in *Owen v. City of Independence,* 445 U.S. 622, 100 S. Ct. 1398, 63 L.Ed.2d 673 (1980), this Court eliminated the affirmative defense of "good faith" to a governmental entity. Moreover, this Court, in *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 101 S. Ct. 2748, 69 L.Ed.2d 616 (1981), took notice of the special fiduciary relationship to the public that vests by governmental action by precluding any

award of punitive damages against a governmental entity. Such a finding was based on an award of punitive damages as against public policy. See also *Kentucky v. Graham,* 473 U.S. ____, 105 S. Ct. 3099, 87 L.Ed.2d 114 (1985), which precluded the expenditure of public funds to satisfy an award of attorney's fees under 42 U.S.C. 1983 as against a public employee found to have individually violated 42 U.S.C. 1983.

Clearly, the Court has recognized the newly-developing manner in which Federal law applies to governmental entities. In addition to imposing additional exposure jurisdictionally, this Court has seen fit to apply Federal law in other areas. The litany of Title VII, Equal Pay Act, and other Federal employment litigation decisions by this and lower Federal circuit courts is far too extensive and voluminous to include in entirety in this Writ. *Griggs v. Duke Power Co.,* 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L.Ed.2d 158 (1971); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973); *Schneider v. City of Atlanta,* 628 F.2d 915 (5th Cir. 1980); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981); *Strecker v. Grand Forks Cty. Soc. Serv. Bd.,* 640 F.2d 96 (8th Cir. 1980); *Dothard v. Rowlinson,* 433 U.S. 321, 97 S. Ct. 2720, 53 L.Ed.2d 786 (1977). The most recent example of this trend and principles is *Garcia v. City of San Antonio,* 469 U.S. ____, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1985), in which prior municipal exemptions from the Fair Labor Standards Act were overruled and said statute applied to governmental entities. It should be noted that *Garcia* reversed, in a period of merely nine years, the contrary opinion in *National League of Cities v. Usery,* 426 U.S.

833, 96 S. Ct. 2465, 49 L.Ed.2d 245 (1976). The short life span of *National League of Cities* gives further argument that governmenal entities are now to be treated differently than under prior decisions.

Suffice it to say that this Court has recognized that special status and relationship any governmental entity has to applicable Federal law.

Accordingly, if a governmental entity bears additional burdens under Federal law, it is only logical that a governmental entity take benefit to those Federal rights and protections afforded any "non-governmental person", as to do otherwise would prevent consistent reading of the opinions of this Court regarding governmental entities.

In the present instance, the denial of equal protection under the law to Petitioner is blatant in that eleven other parties/governmental entities—to the financial benefit of their taxpayers and the recovery of monies—have been treated in an opposite manner to that of the Petitioner—to the financial detriment of its taxpayers and the deprivation of monies that would rightfully be recovered had the Court of Appeals and the Texas Supreme Court treated Petitioner as it had the eleven other parties to the initial litigation.

Given the legal evolution by this Court of governmental exposure, accountability and liability, the findings of the Fourth Court of Appeals and the Texas Supreme Court are against public policy. See *City of Newport, supra.*

This argument is even more persuasive and cogently consistent with decisions of this Court in that Petitioner seeks to espouse its rights and the rights of its taxpayers to equal protection of the law, as opposed to challenging

constitutionality of a statute. See *Town of Ball v. Rapides Parish Police Jury,* 746 F.2d 1049 (5th Cir. 1984); *Coleman v. Miller,* 307 U.S. 433, 59 S. Ct. 972, 83 L.Ed. 1385 (1939); *Williams v. Mayor of Baltimore,* 289 U.S. 36, 53 S. Ct. 431, 77 L.Ed 1015 (1933); *Hunter v. Pittsburgh,* 207 U.S. 161, 28 S. Ct. 40, 52 L.Ed. 151 (1907); *City of Trenton v. New Jersey,* 262 U.S. 182, 43 S. Ct. 534, 67 L.Ed. 937 (1923); *City of S. Lake Tahoe v. California Tahoe Regional Planning Agency,* 625 F.2d 231, cert. denied 449 U.S. 1039, 101 S. Ct. 619, 66 L.Ed.2d 502 (1980).

This issue is addressed before this Court in that those decisions precluding the application of the equal protection clause to governmental entities were decided pre-*Monell, supra,* or sought to strike down legislative enactments of State jurisdictions.

It must be further noted that those suffering the disability for failure of the lower courts to equally apply the law in this case to Petitioner are the citizens paying taxes for the operation of the San Antonio Independent School District. They suffer a "distinct and palpable injury" that is not imposed upon the taxpayers of the eleven other governmental entities to this original action. *Warth v. Seldin,* 422 U.S. 490, 95 S. Ct. 2197, 45 L.Ed.2d 343 (1975); *Valley Forge Christian Church v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982); *Rogers v. Brockette,* 588 F.2d 1057 (5th Cir.), cert. denied, 444 U.S. 827, 100 S. Ct. 52, 62 L.Ed.2d 35 (1979), requiring, in violation of the Fourteenth Amendment, that Petitioner's taxpayers bear a fiscal burden not shared by its co-defendants/parties in the initial litigation, thus satisfying the constitutional requirements for

standing in this Court. *Baker v. Carr,* 369 U.S. 186, 82 S. Ct. 691, 7 L.Ed.2d 663 (1962); *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99 S. Ct. 1601, 60 L.Ed.2d 66 (1979); *Duke Power Co. v. Carolina Envtl. Study Group,* 438 U.S. 59, 98 S. Ct. 2620, 57 L.Ed.2d 595 (1978).

In conclusion, the results of the lower court decisions penalize Petitioner in an unequal manner solely and exclusively as a result of a failure to join in a Motion for Summary Judgment granted in favor of eleven other litigants. This injustice has been compounded by subsequent appellate rulings that now lead this Court to consider equal protection denial of constitutional proportions.

CONSTITUTIONAL AUTHORITIES

This case involves Article I, Section 19, of the Constitution of the State of Texas. Said provision is set out verbatim in the following paragraph:

> "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised except by the due course of the law of the land."

This case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said Section reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" (emphasis added).

STATEMENT

This Petition for Writ of Certiorari has its genesis in a lawsuit where the Respondent, City of San Antonio, initiated legal action, on September 26, 1977, against Petitioner, San Antonio Independent School District, as well as eleven other similarly-situated local school and hospital districts, which action sought the recovery of fees for utility rate services not paid for by those districts. The action also sought declaratory and injunctive relief relative to the parties of that action and the recovery of said fees.

The relevant facts upon which this controversy are based are undisputed by all parties, including Petitioner, San Antonio Independent School District. In 1975, the Texas Legislature enacted the Texas Public Utility Regulatory Act, TEX. REV. CIV. STAT. ANN. art. 1446c (referred to herein as "Art. 1446c" or "the Act"), which established a comprehensive regulatory system over "public utilities" as defined in the Act in order to assure just and reasonable rates, operations, and services to consumers.

The provisions of Article 1446c, *supra,* specifically define the "public utilities" regulated by the Act to exclude utility systems owned and operated by municipal corporations, except for one particular class of city-owned utilities set out in Section 3(c)(4):

"Sec. 3(c). The term 'public utility' or 'utility', when used in the Act, includes any person, cor-

poration, river authority, cooperative corporation, or any combination thereof, other than a municipal corporation, hereafter owning or operating for compensation in this state equipment or facilities for: (1) producing, generating, transmitting, distributing, selling, or furnishing electricity ('electric utilities' hereinafter) . . . (3) transmitting or distributing combustible hydrocarbon natural or synthetic natural gas for sale or resale in a manner which is not subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act (15 U.S.C.A., Section 717, *et seq.*) ('gas utilities' hereinafter) . . . (4) the *term 'public utility' or 'utility' includes any municipally-owned gas or electric utility, whether owned separately or in conjunction with other municipalities operated by a board of trustees which as of May 1, 1975, was not directly appointed by the governing body of the municipality, and does not include any other municipally-owned utility unless otherwise provided in this Act.*

* * * *

(o) 'municipally-owned utility' means any utility owned, operated, and controlled by a municipality or by a non-profit corporation whose directors are appointed by one or more municipalities. *Id.*" (emphasis added).

By virtue of the fact that San Antonio's municipally-owned systems are managed by a board of trustees which, as of May 1, 1975, was not directly appointed by the San Antonio City council,[1] San Antonio's electric and

1. As provided for by TEX. REV. CIV. STAT. ANN. art. 1115 (Vernon Supp. 1985) and specified in the San Antonio City Public Service Board's 1951 Revenue Board Indenture, which will be effective until 1997, the five-member board is composed of the Mayor for San Antonio, who sits as an *ex officio* member, and four additional members, originally named in the indenture, whose successors are chosen by majority vote of the other trustees.

gas systems came within the Section 3(c)(4) classification of "public utilities", even though San Antonio is a municipal corporation. Believing this classification to be invalid, and contending that it was legally required to carry out the statutory responsibilities of a "public utility", including the payment of the gross receipts fee required by § 78 of the Act, the City of San Antonio filed suit against the State in Travis County District Court in November of 1976, pursuant to the State's tax protest statute, TEX. TAX CODE ANN. art. 1.05 (Vernon 1982). The 53rd District Court of Travis County agreed with the City and entered judgment on the merits in that suit in December of 1977, declaring that the Section 3(c)(4) classification is unconstitutional as a special and local law prohibited by Article III, Section 57, of the Texas Constitution. The court also held that the San Antonio gas and electric systems are not a "public utility" under the Act, but are a municipally-owned utility, as defined in Section 3(o), "for all purposes under the Act". That judgment was affirmed by the Third Court of Civil Appeals in *Garrett Morris v. City of San Antonio,* 572 S.W.2d 831 (Tex. Civ. App.—Austin 1978, no writ).

The controversy from which the present suit arises concerns the provisions of Section 48 of Article 1446c, *supra,* a section applying to "public utilities" under the Act, and prohibiting them from including in their rates to school and hospital districts amounts paid in lieu of taxes to the municipality by which the "public utility" is owned:

> "Sec. 48. No payments made in lieu of taxes by a public utility to the municipality by which it is owned may be considered an expense of operation for the purpose of determining, fixing, or regulating

> the rates to be charged for the provision of utility service to a school district or hospital district. No rates received by a public utility from a school district or hospital district may be used to make or to cover the cost of making payments in lieu of taxes to the municipality by which the public utility is owned." TEX. REV. CIV. STAT. ANN. art. 1446c, § 48 (Vernon Supp. 1985).

Prior to the filing of the *Morris* suit, *supra,* and because of the uncertainty relating to San Antonio's true legal status under the Act and the applicability and construction of Section 48, *supra,* the City of San Antonio entered into escrow agreements with the twelve independent school districts and the hospital district served by San Antonio's gas and electric systems in order to escrow the portion of these customers' rates in question, pending resolution of the legal issues. The escrow agreements, effective as of September 1, 1975, are on file with the Court, having been appended as exhibits in support of Motions for Summary Judgment filed below. On September 1, 1976, twelve of the school districts ceased paying the disputed amounts to the City Public Service Board for deposit into the escrow fund and since then, have withheld from their electric and gas rates the disputed portion. One defendant school district and the hospital district continued to pay into the fund.

On October 16, 1979, Respondent, City of San Antonio, filed a Motion for Summary Judgment with the trial court, seeking resolution of this matter short of trial on the merits.

On September 20, 1979, counsel for all parties except the Petitioner, San Antonio Independent School District, filed Motions for Summary Judgment with the trial court,

seeking favorable resolution of these issues short of trial. Counsel for Petitioner, San Antonio Independent School District, at that time did not join in the Motion for Summary Judgment along with the other co-defendants in that action.

On December 29, 1979, a final order and judgment entry was rendered in favor of the City of San Antonio, granting its Motion for Summary Judgment as to all parties, including Petitioner, San Antonio Independent School District. This decision overruled the Motion for Summary Judgment filed by all other parties, with the exception of Petitioner, San Antonio Independent School District. (See Appendix H).

The decision of the trial court was appealed by all defendants, including Petitioner, San Antonio Independent School District, to the Eleventh Civil Court of Appeals.

On April 9, 1981, the Eastland Court of Appeals reversed the decision of the lower court as to the summary judgment granted Respondent, City of San Antonio and rendered summary judgment as to all other parties, with the exception of Petitioner, San Antonio Independent School District, which had not previously filed a Motion for Summary Judgment. The case was reversed and remanded as to Petitioner, San Antonio Independent School District. (See Appendix G).

The decision of the Eastland Court of Appeals was appealed by Respondent, City of San Antonio, to the Supreme Court of Texas. On January 27, 1982, the Supreme Court of Texas refused Respondent, City of San Antonio's, application for rehearing of the case and refused writ of error, n.r.e. (See Appendices F and E).

Subsequently, on July 7, 1982, a Motion for Summary Judgment was filed—in the same suit—in the trial court on behalf of Petitioner, San Antonio Independent School District.

On January 14, 1983, the trial court granted the Motion for Summary Judgment filed by Petitioner, San Antonio Independent School District. A Motion for Summary Judgment filed by Respondent, City of San Antonio, was denied at that time. (See Appendix D).

On November 30, 1984, the Court of Appeals, Fourth Supreme Judicial District, Bexar County, Texas, reversed the decision of the trial court and entered judgment in favor of Respondent, City of San Antonio. (See Appendex C).

On December 14, 1984, Petitioner, San Antonio Independent School District, filed a Motion for Rehearing with the Court of Appeals.

On December 17, 1984, Petitioner, San Antonio Independent School District, filed a second Motion for Rehearing with the Court of Appeals.

On January 4, 1985, the Court of Appeals denied Petitioner's Motion for Rehearing.

Subsequently, on January 31, 1985, Petitioner, San Antonio Independent School District filed an Application for Writ of Error.

On April 10, 1985, the Supreme Court of Texas refused the Petitioner's Application for Writ of Error with the notation: "no reversible error".

On April 23, 1985, Petitioner filed a Motion for Rehearing on Application for Writ of Error in which Peti-

tioner, in Point Five, raised the issue that an overruling of the Motion would result in a denial of equal protection. Said Point reads as follows:

> "The Supreme Court and the Court of Appeals, each independently, have denied Petitioner the equal protection of the laws in violation of the Fourteenth Amendment, Section 1, to the United States Constitution and Article I, Section 19, of the Texas Constitution." (See Appendix I).

On June 12, 1985, the Supreme Court of Texas, nevertheless, overruled Petitioner's Motion for Rehearing on Application for Writ of Error.

Thus, the Federal question was raised and presented at the State level, and was, by implication, decided by the Texas Supreme Court. There was no Federal question until the Texas Supreme Court denied Petitioner's Application for Writ of Error; thereby, the Federal question of equal protection arose and the issue was noted in the Petitioner's Motion to rehear.

REASONS FOR GRANTING WRIT

This case concerns the rights of San Antonio Independent School District and, more importantly, the District's taxpayers, who, in addition, are being denied equal protection of the laws as provided by the Fourteenth Amendment, Section 1, to the United States Constitution and Article I, Section 19, of the Texas Constitution.

The Supreme Court of Texas refused the School District's Application for Writ of Error, no reversible error, in this cause on April 10, 1985, and overruled the School District's Motion for Rehearing on June 12, 1985. The

Supreme Court of Texas also refused the City of San Antonio's Application for Writ of Error, no reversible error, on January 27, 1982, in Cause Number C-423, *City of San Antonio v. San Antonio Independent School District, et al,* 614 S.W.2d 917, (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.).

Consequently, the Supreme Court of Texas has n.r.e.'d two lower court decisions *in the same case,* involving exactly the same parties (including Petitioner), and the same facts and issues of law, permitting to stand the diametrically opposite and totally different judgments of the respective intermediate courts.

It is specifically provided in Vernon's Ann. Civ. St. art. 1728 that the Supreme Court of Texas shall have jurisdiction over those judgments in which "one of the Court of Appeals holds differently from a prior decision of another Court of Appeals, or of the Supreme Court upon any question of law material to the decision of the case".

This is exactly the situation the Petitioner's case falls under; nevertheless, as mentioned before, the Supreme Court of Texas disregarded jurisdiction and denied the Petitioner the same relief given to the other school districts, even though the Petitioner's situation was exactly the same as the other school districts.

Petitioner, thus, has been left out in the cold. As much entitled to the same relief as the other eleven school districts, it has been denied such relief, and, on the basis of the two totally conflicting "n.r.e.'s" by the Texas Supreme Court, and thereby denied the equal protection of the law by the Texas Supreme Court, contrary to the United States Constitution.

Even more importantly, the taxpayers of Petitioner School District have also been denied the same equal protection rights that Petitioner has been denied. Subsequently, while the other school districts will be dividing their respective shares of escrow account, Petitioner will get nothing.[2]

Both the majority of the Fourth Supreme Judicial District of Texas Court of Appeals and the Texas Supreme Court violated the Petitioner's right to equal protection under the law in ignoring the principle of the law of the case, which is defined as that principle which states that questions of law decided on appeal to a court of ultimate last resort will govern the case throughout all of its subsequent stages, including a retrial and a subsequent appeal.[3] *Wells on Res Judicata and Stare Decisis,* Section 6b; *Barrows v. Ezer,* 624 S.W.2d 613 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Cropp v. Prather,* 526 S.W.2d 283 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.); *Houston Endowment, Inc. v. City of Houston,* 468 S.W.2d 540 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.). Ironically, it was this same Fourth Court of Appeals that recognized that the doctrine of the law of the case mandates that a court refuse to reconsider what it has already decided, irrespective of

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2. The San Antonio Independent School District, by agreement with the City of San Antonio and the City Public Service Board, escrowed, from September 1, 1975 to February 28, 1982, $1,266,162.06. Interest earned on the escrowed funds amounts to $842,875.00, which increased the funds retained by the City of San Antonio to a total of $2,069,037.06.

3. See the dissenting opinion of Justice Cantu, attached as Appendix C, Page 21a, in which Justice Cantu assails the conclusions of his brethren. "To conclude that the Eastland Court and the Texas Supreme Court as well, did not expressly or by necessary implication address the contention now once again urged is hogwash. . . ."

whether the decision of a former court is right or wrong. *Exxon Corp. v. Butler,* 585 S.W.2d 881 (Tex. Civ. App. —San Antonio 1979, writ dism'd, 619 S.W.2d 399); see also *Chicago & N. W. Transportation Co. v. United States,* 574 F.2d 926 (7th Cir. 1978); *Vendo Co. v. Lecktro-Vend Corp.,* 434 U.S. 425, 98 S. Ct. 702, 54 L.Ed.2d 659 (1978), Pages 662, 663.

Consequently, the result of the case of the "conflicting n.r.e.'s" is that this Petitioner, upon the same facts, laws and issues, will receive relief disproportionate to the other eleven school districts, when, in truth and in fact, *all districts* are undeniably entitled to equal treatment in the law in this regard. In addition, the Respondent has apparently assumed a total repeal of the doctrine of *res judicata,* and the law of the case. The other districts received a final judgment for all components as being in "lieu of taxes" and have enjoyed such benefit thereof from the inception of Article 1446c to date, by virtue of the judgment rendered by the Eastland Court.

To invidiously discriminate between these Bexar County school districts in this regard is absolutely indefensible. There is no element which supports a division of the twelve districts into two classes in this regard, one consisting of Petitioner and the other of the other districts.

The Supreme Court of Texas, as well as the San Antonio Court, has denied Petitioner the equal protection of the laws by this invidious discrimination, without reason, by refusing its Application, after refusing the Respondent's Application in the first case.

CONCLUSION

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, the Petitioner herein, prays that a Writ of Certiorari issue to review the denial by the Supreme Court of Texas of its Application for Writ of Error on April 10, 1985, and the overruling of Petitioner's Motion for Rehearing on June 12, 1985 by the Supreme Court of Texas, thereby upholding the November 30, 1984 judgment of the Court of Appeals, Fourth Supreme Judicial District, Bexar County, Texas, which had reversed the trial court's judgment for Petitioner.

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

NICHOLAS AND BARRERA, INC.
424 East Nueva
San Antonio, Texas 78205
(512) 224-5811

By: _____
JOSEPH E. SCURO, JR.
State Bar Number 17939500
Attorney for Petitioner

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that three true and correct copies of the above and foregoing Petition for Writ of Certiorari have been mailed by Certified Mail, Return Receipt Requested, to Mr. Crawford P. Reeder, First Assistant City Attorney, City of San Antonio, P.O. Box 9066, San Antonio, Texas 78285, on this the _____ day of September, 1985.

JOSEPH E. SCURO, JR.

APPENDIX A

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711

Mary M. Wakefield, Clerk

June 12, 1985

Mr. Joseph E. Scuro, Jr.
NOCHOLAS AND BARRERA, INC.
424 East Nueva
San Antonio, TX 78205

Mr. Crawford B. Reeder
First Assistant City Attorney
City Hall
San Antonio, TX 78205

RE: Case No. C-3866

STYLE: SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. CITY OF SAN ANTONIO

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By: /s/ BARRY E. PICKETT
Deputy

APPENDIX B

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711

Mary M. Wakefield, Clerk

April 10, 1985

Mr. Joseph E. Scuro, Jr.
NOCHOLAS AND BARRERA, INC.
424 East Nueva
San Antonio, TX 78205

Mr. Crawford B. Reeder
First Assistant City Attorney
City Hall
San Antonio, TX 78205

RE: Case No. C-3866

STYLE: SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. CITY OF SAN ANTONIO

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk

By: /s/ CLAIRE KEEFE
Deputy

APPENDIX C

COURT OF APPEALS
Fourth Supreme Judicial District of Texas
San Antonio

OPINION

Appeal No. 04-83-00192-CV

CITY OF SAN ANTONIO,
Appellant

v.

SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT,
Appellee

Appeal from the 57th District Court
of Bexar County

Trial Court No. 77-CI-13810

Honorable Eugene Williams, Judge Presiding

Opinion By: Preston H. Dial, Jr., Associate Justice
Concurring Opinion By: Carlos C. Cadena, Chief Justice
Dissenting Opinion By: Antonio G. Cantu, Associate Justice

Sitting: Carlos C. Cadena, Chief Justice
Antonio G. Cantu, Associate Justice
Preston H. Dial, Jr., Associate Justice

Delivered and Filed: November 30, 1984

REVERSED AND RENDERED.

This is an appeal from summary judgment in favor of the San Antonio Independent School District (SAISD) exempting it from paying certain charges for gas and

electric service from the utility owned by the City of San Antonio.

The City purchased the utility in 1942 pursuant to the authority of TEX. REV. CIV. STAT. ANN. art. 1111-1118 (Vernon 1963). To finance the purchase, the City entered into a trust indenture. The indenture and the applicable statutes provided that the utility would be managed by a self-perpetuating board of trustees not appointed by the City. The indenture also created a lien on the properties and revenues of the system. The indenture and the statutes provided for payment to the city from the utility in three components pertinent to the instant suit:

(1) A payment in lieu of ad valorem taxes.

(2) Reimbursement for the City's payments for gas and electricity and expenditures for street lighting extensions and improvements.

(3) An additional payment in an amount that when added to (1) and (2) above would total 14% of the utility's gross revenues.

Starting in 1975, SAISD, twelve other independent school districts in Bexar County, and the Bexar County Hospital District, either escrowed or withheld 14% of their monthly bill from the City's utility. The City sued for declaratory and monetary relief. The facts were undisputed and stipulated. All parties filed motions for summary judgment except SAISD. The City's motion for summary judgment was granted, and all others were denied.

The school and hospital districts appealed, and the Eastland Court of Appeals reversed the trial court. *San Antonio Independent School District, et al v. City of San*

Antonio, 614 S.W.2d 917 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.). The appellate court held that TEX. REV. CIV. STAT. ANN. art. 1446c, § 48 (Vernon 1980)[1] applied to the City. This resulted in exempting the school and hospital districts from paying rates which "may be used to make or to cover the cost of making payments in lieu of taxes to the municipality by which the public utility is owned." The court rendered judgment for all appellants except SAISD. Since SAISD had not filed a motion for summary judgment, judgment against it was reversed, and the cause remanded. Application for writ of error was refused, n.r.e. On remand, the trial court granted summary judgment for SAISD declaring,

> Section 48 of article 1446c exempts (SAISD) from paying gas and electric utility charges to (City) which are based upon rates which are set so as to allow the following as items of expense of the system's operation:
>
> (a) lieu of tax payments by the utility to the City;
>
> (b) reimbursement by the utility to the City for the latter's gas and electrical expenses and expense of additions to the City's street lighting and traffic lighting systems, and
>
> (c) profit made by the City from the utility's operation, as that term is defined in *San Antonio Independent School District v. City of San An-*

1. Article 1446c, § 48.
No payments made in lieu of taxes by a public utility to the municipality by which it is owned may be considered an expense of operation for the purpose of determining, fixing, or regulating the rates to be charged for the provision of utility service to a school district or hospital district. No rates received by a public utility from a school district or hospital district may be used to make or to cover the cost of making payments in lieu of taxes to the municipality by which the public utility is owned.

> *tonio,* 550 S.W.2d 262 (Tex. 1977); although under the terms of the Trust Indenture *only part* of the payments made by the System to the City is in lieu of taxes, as set forth in Section 48. This Summary Judgment is granted solely because of the holding by the Eastland Court of Appeals.

The City now brings this appeal contending that the trial court erred in granting the summary judgment in favor of the SAISD since the Eastland decision had not actually addressed the issue as to what constitutes payments "in lieu of taxes" under article 1446c, § 48. The City argues that § 48's exemption pertains only to payments made in lieu of ad valorem taxes, thus, narrowly construing the language of § 48 and preserving the school district's liability for those charges attributable to expenses other than the reimbursements for lost taxes.

The City concedes that the Eastland decision did resolve that § 48 was applicable to San Antonio's gas and electric utility, and with regard to that issue, the doctrine of the law of the case applies. The City, however, urges that the trial judge's decision to apply § 48's exemption to all three component payments as "in lieu of taxes" based solely on the Eastland decision was error since such an interpretation went beyond the scope of the Eastland holding.

The issue as to what constitutes § 48's "payments in lieu of taxes" had been presented to the Eastland Court in a cross-point, however, it was not specifically addressed in that Court's decision. Likewise, the City's motion for rehearing to that Court of Appeals and subsequent writ of error and motion for rehearing to the Supreme Court re-asserted the issue but were denied without opinion.

The doctrine of "the law of the case" is that principle where, the determination of a question of law having already been made on a prior appeal to a court of last resort, such determination will generally be held to govern the case throughout all of its subsequent stages, including a retrial and subsequent appeal. *Transport Insurance Co. v. Employers Casualty Co.*, 470 S.W.2d 757, 762 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.); *Houston Endowment, Inc. v. City of Houston*, 468 S.W.2d 540, 543 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.). Questions of law expressly decided in a prior appeal are subject to the doctrine.

Since the court neither expressly or by necessary implication determined the meaning of § 48's "payments in lieu of taxes," we hold that the Eastland decision is inapplicable to that issue now before this court.

We sustain City's first point of error.

The City's second point of error is that the trial court erred in failing to limit § 48's application solely to the "in lieu of taxes" component of the utility's payments to the City. In its counterpoint, SAISD argues that all of the component payments made pursuant to the indenture are "in lieu of taxes" because if the City did not receive those payments, it would have to raise the money it derives from them by taxation. The City rebuts this contention by presenting numerous sources of City revenues, the payments from which are not considered taxes. Indeed, such was the holding in *Bexar County v. City of San Antonio*, 352 S.W.2d 905 (Tex. Civ. App.—San Antonio 1962, writ dism'd), where this Court expressly held that sewer charge revenues which render a profit to the City were not taxes. *Id.* at 908. The mere fact that

revenues are put into a general fund and used for public purposes, as were the payments in the case at hand, does not necessarily make them taxes.

The City's position is further supported by strong case-law. In *San Antonio Independent School District v. City of San Antonio,* 550 S.W.2d 262 (Tex. 1977), the Supreme Court specifically addressed the issue as to what constitutes payments "in lieu of taxes." In that case, which involved the same trust indenture as the case at bar, all the school districts in San Antonio sought a declaratory judgment against the City for the refund of portions of gas and electric payments they had paid in previous years. Their argument was similar to that presented in the present case. The schools contended that since the 14% indenture payment authorized by article 1113a was factored into the municipally-owned utility's rates, their payments as a part of that 14% was a tax on them prohibited by the Constitution. The Supreme Court denied the school districts' claims of exemptions and clarified the nature of the identure payments. The court recognized that the first component is a payment in lieu of ad valorem taxes that would be received if the utility was not municipally owned, which the City is entitled to receive under TEX. REV. CIV. STAT. ANN. art. 1113. Component payment number (2) is free service which the City is entitled to receive under the same statute. The cash payment in number (3), was held to be a reasonable profit which the City is entitled to receive under TEX. REV. CIV. STAT. ANN. art. 1113 (a), which was enacted in 1949. *Id.* at 263-64. Thus, the whole 14% is not a payment in lieu of taxes.

Accordingly, we reverse the trial court's judgment and render as to the meaning of the phrase "payments in lieu of taxes" found in article 1446c, § 48. Our interpretation of that phrase is that it includes only payments made by the utility to the City to offset the City's lost ad valorem tax revenues.

The City may retain all funds received by it or the utility from SAISD under the Interim Payment Agreement heretofore entered into by the parties except the fractional equivalent of the monies paid by the utility to the City in lieu of ad valorem taxes for the period in question.

PRESTON H. DIAL, JR.
Associate Justice

Appeal No. 04-83-00192-CV

CONCURRING OPINION

CITY OF SAN ANTONIO,
Appellant

v.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,
Appellee

Appeal from the 57th District Court of Bexar County
Trial Court No. 77-CI-13810
Honorable Eugene Williams, Judge Presiding

Opinion by: Preston H. Dial, Jr., Associate Justice
Concurring Opinion by: Carlos C. Cadena, Chief Justice
Dissenting Opinion by: Antonio G. Cantu, Associate Justice

Sitting: Carlos C. Cadena, Chief Justice
Antonio G. Cantu, Associate Justice
Preston H. Dial, Jr., Associate Justice

Delivered and filed: November 30, 1984

We are not, in this case, required to give controlling effect to the prior decision of the Eastland Court as the law of case if such decision is clearly erroneous. *See Barrows v. Ezer,* 624 S.W.2d 613 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ), *Connecticut General Life Insurance Co. v. Bryson,* 148 Tex. 86, 219 S.W.2d 799 (1949).

Article 1446c, section 48 provides only that "payments in lieu of taxes" shall not be considered "an expense of operation" of a city owned utility in determining the rates to be charged for the provision of service to a school district or hospital district. If the Eastland Court held that "payments in Lieu of taxes" as that term is used in section 48, to include any payments other than

those payments representing the amount of taxes paid by the previous private owners of the system, such holding is clearly erroneous and lacks support in the law and in the facts of this case.

Before discussing the egregious nature of the error, it should be pointed out that we are dealing with a decision of another intermediate appellate court, and not with a decision of the Texas Supreme Court.[1]

Prior to 1949 article 1113 prescribed the only financial benefits enjoyable by a city which owned its own utility system as the result of such ownership. The statute provided for free service to the city. This provision for free service was followed by a provision requiring that the rates charged for service be sufficient to pay (1) operation, maintenance, depreciation, replacement, betterment and interest charges; (2) interest and principal on out-

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1. The Supreme Court's refusal of a writ of error does not make the judgment of the intermediate court the judgment of the Supreme Court. When an application for writ of error is refused, the judgment of the intermediate appellate court remains the operative judgment in the case. *Merchandise Mart, Inc. v. Marcus,* 515 S.W.2d 663 (Tex. 1974).

The opinion of the Eastland Court of Appeals on which the school district relies reflects only one holding by the Eastland Court. The only question discussed in the opinion is whether the term "public utility" found in article 1446c, § 48, applies to a municipally-owned utility. The only holding reflected in the opinion is that § 48 applies to a municipally-owned utility. The only meaning of a term discussed in the opinion is the meaning of the term "utility." Nowhere in the opinion did the Eastland Court make any statement which indicates that it was concerned with the meaning of the term "payments made in lieu of taxes." *San Antonio Independent School District v. City of San Antonio,* 614 S.W.2d 917 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.).

It has been held that the only issues settled by the Supreme Court's refusal of an application for writ of error are those "which are found in the opinions [sic] of the" intermediate court. *Sierra Club v. Austin Independent School District,* 489 S.W.2d 325, 330 (Tex. Civ. App. —Austin 1973), *rev'd, other grounds,* 495 S.W.2d 878 (Tex. 1973).

standing bonds; and (3) outstanding indebtedness of the system. The statute then proscribed the use of revenue from the system for any other debt, expense or obligation of the city, except payments in lieu of ad valorem taxes paid by the private owners of the system. In brief, the statute provided, in three separate sentences for:

1. Free service to the city.
2. Payment of principal and interest on outstanding bonds.
3. Payment of certain debts enumerated in the statute.
4. Payments in lieu of ad valorem taxes.

Even the most casual reading of the statute compels the conclusion that the provision for free services is separate and distinct from the provision for payments in lieu of ad valorem taxes. The statute authorized free service and payments in lieu of taxes.

Article 1113a, enacted in 1949, authorizes the transfer to the city from the revenues of the utility system in any amount authorized by the indenture securing the payment of revenue bonds. The emergency section of the 1949 enactment recites that the increased costs of labor and material required for the rendition of municipal services "requires that all sources of municipal revenues be immediately availed of by" cities which own utility systems.[2]

It is manifest that article 1113a was enacted for the purpose of permitting cities which owned utility systems

2. Acts 1949, 51st Leg., p. 940, ch. 513, § 2. As enacted in 1949, article 1113a applied only to cities having a population of 200,000 or more. It was amended in 1953 to make the provisions applicable to cities having a population of 10,000 or more. Acts 1953, 53rd Leg., p. 422, ch. 122, § 1.

to provide, by indenture, for payment to the general funds of such cities from the revenues of the utility, in addition to payments in lieu of taxes already authorized by article 1113. It must be concluded that not all payments made to a city from revenues of utilities owned by such city constitute "payments in lieu of ad valorem taxes." If the provision for payments in lieu of ad valorem taxes which is found in article 1113 includes payments of the amount of ad valorem taxes which would be paid if the utility were privately owned as well as all other payments which might be made to the city from the utility's revenues, then the Legislature, in enacting article 1113a in 1949, was doing a useless thing.

The indenture between the City of San Antonio and the holders of gas and electric revenue bonds contains a "flow of funds" provision which assigns priorities to the purposes for which the utilitys revenues may be applied. The revenues are to be used according to the following priority:

1. Payment of operating expenses.

2. Payment of principal and interest on outstanding bonds.

3. Reimbursement to the city for loss of taxes which the city would have received if the utility were privately owned.

4. Payment of an amount equal to 12½% of gross revenues into a Improvements and Contingencies Fund.

5. After the payment of 12½% of gross revenues to the Improvement and Contingency Fund, the following payments are to be made to the city's fund, to the extent available from the remaining revenues:

a. A sum sufficient to reimburse the city for all amounts paid to the utility by the city during the year for gas and electric services used by the city for municipal purposes.

b. A sum in cash which when added to (1) the payment in lieu of taxes (2) the amount of reimbursements for electric and gas services during the year, and (3) the amount expended during the year for additions to the street and traffic lighting systems, will total an amount equal to 14% of the gross revenues of the system.

It is significant that the "flow of funds" provisions of the indenture establish five priorities. The provision for payment in lieu of taxes has a number 3 priority, with only the provision for payment of operating expenses and payment of principal and interest on bonds having a higher priority. The provisions for free service (reimbursement for amounts paid for service and additions to the street and traffic lighting systems) and for the payment of additional sums in cash which, when added to the payment in lieu of taxes and the costs of free service, will total 14% of the gross revenues of the city are assigned the lowest priority, number 5. The payments into the general fund under priority number 5 are expressly conditioned to be made until the payment required by priority number 4 (payment into Improvement and Contingencies Fund) has been made. Thus, the payment in lieu of taxes has a higher priority than the payment into the Improvement and Contingencies Fund, while the other payments into the general fund have a lower priority. The indenture, like article 1113, makes a clear distinction between payments in lieu of taxes and other payments into the city's general fund.

The phrase "payment in lieu of ad valorem taxes paid by private owners" is free from ambiguity. It refers to payment for taxes, based on the value of the thing taxed, imposed by a governmental agency in the exercise of the taxing power. While it is conceivable that a privately owned utility, in addition to paying ad valorem taxes imposed by the city, might agree to, in effect, make an additional payment of 14% of the utility's gross revenues to the city, such additional payment would not be a payment of ad valorem taxes. A payment in addition to taxes is not a payment in lieu of taxes. The payment in addition to taxes would necessarily result from the civic mindedness and generosity of the private owner, or from a contract, but it would not arise from the exercise by the city of its power to levy ad valorem taxes. In the case before us, the city receives the additional payments because of the provisions in the indenture, authorized by article 1113a, and not as revenues derived from the exercise of the taxing power. If the indenture did not provide for such additional payments, the city could not, by exercising its taxing power, require that the payments be made.

In *San Antonio Independent School District v. City of San Antonio,* 550 S.W.2d 262, 264 (Tex. 1977), our Supreme Court held that the benefits received by the City of San Antonio, in addition to payments in lieu of taxes and free services, represented, under articles 1113 and 1113a constitute a profit realized by the city as a result of its ownership of the gas and electric systems. The decision of the Eastland Court cannot be reconciled with this holding, unless we are prepared to accept the indefensible theory that making a profit constitutes a payment in lieu of ad valorem taxes. The benefit results,

as the Supreme Court pointed out, from the fact that the city owns the utility. If the utility were privately owned, the city could not exact such payment by exercising its taxing power.

The school district argues that the payments in dispute must be classified as payments in lieu of taxes because, in the absence of such payments, the city would have to impose taxes in order to raise an equivalent amount of revenue. This argument is completely unpersuasive. The notion, if accepted, would compel the conclusion that all revenue received by a city, including such things as fines levied by municipal courts and revenues realized from the sale of surplus city property, represents a payment in lieu of taxes.

Article 1113 makes a clear distinction between the receipt of free services and payments in lieu of taxes. The indenture entered into by the City of San Antonio and holders of gas and electric bonds issued by the city clearly recognize the distinction. Since, as the Supreme Court has held, the city is entitled to make a profit from its ownership of the gas and electric systems, payment of such a profit to the city from the revenues of the utility system cannot be classified as a payment in lieu of taxes, since the city would not receive such revenues as taxes if the system was privately owned.

It is true that section 48 of article 1446c uses the term "payments in lieu of taxes" rather than "payments in lieu of ad valorem taxes," the phrase used in article 1113. Rendition of free services and the payment of a profit to the owner of a utility cannot be classified as payments in lieu of taxes, ad valorem or otherwise. A city could not compel, by exercise of the taxing power, a privately

owned utility to render free service to the city. A city could not, by exercise of its taxing power, compel such private owner to forego a right to make a profit and, instead, pay such profit to a non-owner. Since a city lacks the power to exact such benefits from a private owner as part of his obligation to pay taxes, its receipt of such benefits from a utility owned by it cannot be classified as payments in lieu of taxes. Need we ask the question: In lieu of which taxes are such benefits received?

There is nothing in the language of section 48 of article 1446c which suggests that "payments in lieu of taxes" was intended to include all benefits received by a city because of its ownership of a utility system. "Payments in lieu of taxes" must be taken to refer to those taxes which the city would receive if the utility system were privately owned. To interpret the phrase as referring to all benefits received by a city because of its ownership of a utility would be to impute to the legislature a complete unfamiliarity with the English language. It can be conceded that "taxes" is a broad term, but under no conceivable theory can it be expanded to include benefits and revenues which the city would be powerless to exact from a utility which is privately owned.

If the Eastland Court held that "payments in lieu of taxes" include free services and the realization of a profit from the owner of a utility, the decision is "clearly erroneous" and should not be applied to this case as "the law of the case."

CARLOS C. CADENA,
Chief Justice

DISSENTING OPINION

Appeal No. 04-83-00192-CV

CITY OF SAN ANTONIO,
Appellant

v.

SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT,
Appellee

Appeal from the 57th District Court of
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Honorable Eugene Williams, Judge Presiding

Opinion By: Preston H. Dial, Jr., Associate Justice
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Dissenting Opinion By: Antonio G. Cantu, Associate Justice

Sitting: Carlos C. Cadena, Chief Justice
Antonio G. Cantu, Associate Justice
Preston H. Dial, Jr., Associate Justice

Delivered and Filed: November 30, 1984

Today a majority[1] of this court bows to the dogged reluctance of the appellant City's refusal to accept appel-

1. Since the registering of my dissent to the original majority opinion written by Justice Dial Chief Justice Cadena, now candidly and in a "no holds barred" approach lambastes the holding of the Eastland Court of Appeals in his concurring opinion. Although Justice Dial's opinion can no longer accurately be referred to as a majority opinion collectively both opinions do a disservice to the doctrine of the law of the case. Insofar as both opinions refuse to adhere to the doctrine, I will continue to refer to them collectively as "the majority."

late finality and we are treated to the application of a new twist to the doctrine of the law of the case. That doctrine as applied today transforms the prior result into the law of *that* case and the result in this appeal, the majority pronounces, becomes the law of *this* case.

I think judicial honesty would be best served if both simply disagreed and registered their disagreement with the holding of the Eastland Court of Appeals instead of fantasizing that our brethern in Eastland were incapable of recognizing issues being presented, not once but twice. The import of both opinions is that the decision of the Eastland Court was based upon an erroneous or incomplete application of the law necessary to a plenary disposition of the matter before it. If the majority believes the prior opinion to be erroneous[2] it should exhibit the honesty and candor one can at least attribute to the City's posture in the instant appeal.[3]

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2. Chief Justice Cadena's belated attempt to claim error in the Eastland holding, however, falls short of the prerequisite to invoking the exception to the doctrine. The exception applies only where the decision on a former appeal was *clearly* erroneous. *Connecticut General Life Insurance Co. v. Bryson,* 148 Tex. 86, 219 S.W.2d 799 (1949); *Miller v. Winn,* 28 S.W.2d 578 (Tex. Civ. App.—Fort Worth 1930, writ ref'd). I refuse to ascribe to the observation made by Chief Justice Cadena that the Supreme Court by refusing to grant writ of error with the notation "no reversible error" was incapable of recognizing error of such "egregious nature." If the error was so egregious it would have been readily identifiable without the need for further reflection. I further question the authority of the majority to decline to adhere to the doctrine when only one justice ascribes to the "erroneous holding" exception.

3. The City of San Antonio in its Supplemental Motion for Summary Judgment and throughout the appellate history of this case has openly displayed its intentions, viz:

> Although the facts in this case are undisputed and are the same for purposes of the court's decision as when the Eastland decision was rendered the City still asserts the same legal contentions, arguments, and authorities as it has always asserted.

Justice Dial, after alluding to the doctrine, makes the following statement: "Since the court neither expressly or by necessary implication determined the meaning of § 48's 'payments in lieu of taxes,' we hold that the Eastland decision is inapplicable to that issue now before this court."[4]

Such a statement can only mean that the Eastland Court was not authorized to arrive at a final decision on the merits without addressing every contention raised by the parties. This court, as does every appellate court, often disposes of points deemed unnecessary to a final determination by simply not addressing them. A disposition sub silentio does not mean that the court has not given the contentions raised due consideration. To the contrary, addressing unnecessary contentions rarely adds

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> This is not because of mere stubbornness but because of two factors about the Eastland decision: (1) The decision was wrong. It did not address the issues raised by the parties' briefs; it cited law not cited by either party and not relevant to the proper determination of the case; and it recited as 'undisputed facts' matters not true and not even in the record. (2) It also failed to decide the City's alternative point raised by crosspoint in City appellee's brief upon which point a decision was necessitated by the decision on the portion of the case which the court determined adversely to the City. Although the omission was called to the Eastland Court's attention on Motion for Rehearing, that court summarily (in one week) denied such motion without comment. . . .
>
> * * * *
>
> In short, City wishes a relitigation of its principal contentions for the reasons contained above and City especially wants an express judicial determination of its alternative point. . . . This point has never been expressly determined one way or the other by *any* court.

4. Even the City admits that the Eastland opinion impliedly decided the point it now urges on appeal but urges that such decision by implication should not be binding as law of the case inasmuch as the basis for the decision cannot be ascertained from a reading of the opinion.

to the jurisprudence of this state regardless of the parties' desire for an advisory opinion.

To conclude that the Eastland Court, and the Texas Supreme Court as well, did not expressly or by necessary implication address the contention now once again urged is hogwash. The Supreme Court's action on the application for writ of error and subsequent motion for rehearing can hardly be classified as a failure to consider the contentions urged simply because the court refused to write on the matter. In my opinion the contentions reurged were just as conclusively overruled by both courts' refusal to address them. *See Goodman v. Olsen,* 365 So.2d 393, 396 (Fla. App. 1979) [. . . when a point which was not discussed in an appellate opinion is necessarily determined by the opinion, the doctrine of law of the case is applicable].

The doctrine has often been addressed by Texas courts and defined as that principle which states that questions of law decided on appeal to a court of ultimate last resort will govern the case throughout all of its subsequent stages, including a retrial and a subsequent appeal. *Barrows v. Ezer,* 624 S.W.2d 613 (Tex. Civ. App.—Houston [14th Dist.], 1981, no writ); *Kropp v. Prather,* 526 S.W. 2d 283 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.); *Houston Endowment, Inc. v. City of Houston,* 468 S.W. 2d 540 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.). The doctrine has also been stated to mean that the holdings announced in a former appeal constitute the law of the case; that matters were either presented to or directly passed upon or which were in effect disposed of on a former appeal to a court of civil appeals will not again be passed upon by that court. *Allied*

Finance Co. v. M. T. Shaw, 373 S.W.2d 100 (Tex. Civ. App.—Fort Worth 1963, writ ref'd n.r.e.).

In *Roberts v. Armstrong,* 231 S.W. 371 (Tex. Comm'n App. 1921, holding approved, judgment adopted), the court in quoting from *Wells on Res Adjudicata and Stare Decisis,* § 6B, stated:

> It is a well-settled principle that the question of law decided on appeal to a court of ultimate resort must govern the case in the same court and the trial court, through all subsequent stages of the proceedings, and will seldom be reconsidered or reversed, even if they appear to be erroneous.
>
> The application of this rule, however, contemplates that the facts on the second appeal shall be substantially the same, or rather, perhaps, that they shall not be such as to affect materially the legal questions involved under the first appeal.

It is undisputed that the facts on the second appeal [the instant one] are identical to those in the first appeal. It is further undisputed that the legal questions involved are the very same ones presented in the first appeal. Nor is there any serious contention, other than by the City in its bid to have the same matter once again litigated, that the decision of the Eastland Court is clearly erroneous.[5] Even the majority is unwilling to agree that clear error exists in the Eastland opinion in view of the notation of no reversible error granted by the Supreme Court.

This very court in *Exxon Corp. v. Butler,* 585 S.W.2d 881 (Tex. Civ. App.—San Antonio 1979, writ dism'd, 619 S.W.2d 399), speaking through Justice Murray, re-

5. The City categorizes the Eastland opinion as "bizarre and arcane."

cognized that the doctrine applies irrespective of whether the decision of the former appeal is right or wrong. *See also, Chicago & N.W. Transportation Co. v. United States,* 574 F.2d 926 (7th Cir. 1978). Thus, even if the majority disagrees with the prior holding and desire to express the opinion that the Eastland Court fell into error, the doctrine mandates that this court refuse to reconsider what has already been decided. This is so not because of a limitation on the power of this court, but because of public policy's concern with a finality to litigation. *Elliott v. Moffett,* 165 S.W.2d 911 (Tex. Civ. App.—Texarkana 1942, writ ref'd w.o.m.). Because the Eastland Court is a court of coordinate jurisdiction, comity considerations require this court to refuse to rehear that which has once before been advocated and rejected. *People v. Watson,* 57 A.D.2d 143, 393 N.Y.S.2d 735, 738 (1977). The doctrine of the law of the case is designed to prevent just such an anomaly as would result from this court telling the trial court that it had erred in obeying the mandate of the Eastland Court. *See Chicago & N.W. Transportation Co. v. United States, supra,* at 930.

The United States Court of Appeals for the Seventh Circuit in *Chicago* recognized the long term effects of the problem which the majority now creates. It stated:

> The fact that earlier review was by a different court does not alter our conclusion. If anything, that fact makes the case for application of the doctrine even stronger, for principles of comity come into play. If we now held that the commission erred in obeying the mandate of the three-judge court, a third court reviewing the commission's order following our remand might hold that we in turn were wrong. That result would be prevented only by the same doctrine of law of the case, aided by principles of comity.

> *See Gulf Research & Development Co. v. Schlumberger Well Surveying Corp.*, 98 F. Supp. 198, 200-201 (D. Del.), *petition for mandamus denied sub nom; Gulf Research & Development Co. v. Leaky*, 193 F.2d 302 (3rd Cir. 1951), *aff'd per curiam by an equally divided court*, 344 U.S. 861, 73 S. Ct. 102, 97 L.Ed. 668 (1952); *see generally, Hoffman v. Blaski*, 363 U.S. 335, 345, 80 S. Ct. 1084, 4 L.Ed. 2d 1254 (1969) (Frankfurter, J. dissenting), that should govern us now.

574 F.2d at 930.

The law of the case must control the disposition of this case in the absence of some unusual circumstance or some compelling reason. *See Chicago & N.W. Transportatoin Co. v. United States, supra.* None appears of record and the majority can point to none other than to intimate that the Eastland Court did not finish the job or that upon subsequent reflection egregious error cries out from the prior holding.

While this court may reserve to itself the right to disagree with the decision of the Eastland Court as it may be applied to another case, yet it is well settled that a judgment of an appellate court in a case becomes the law of that particular case, and is not subject to review on a second appeal. *Cf., Rail N Ranch Corp. v. State*, 441 P.2d 786, 7 Ariz. App. 558 (1968).

I find the following language in *Rail N Ranch Corp. v. State, supra,* appropriate:

> As we view the doctrine of law of the case, a policy objective is to provide for the orderly processing and expeditious resolution of controversy in a particular law suit. This policy would be frustrated if it were to be insisted that only the opposing parties

> in a particular appeal were to be bound as between themselves by an appellate decision rendered in a case. Multiple appeals in a single suit are not uncommon, and if decisions rendered on appeal were to be binding only as between the opposing parties on appeal, instead of orderly procedure, we would have a procedural maze with many cul-de-sacs.
>
> * * * *
>
> And, were we to attempt to completely undo what we did [or a court of coordinate jurisdiction did for us][6] in the previous proceeding, we would be violating the fundamental principle of res judicata which we are seeking to satisfy, in that we would be holding against the position of parties to the previous appellate proceeding who have not been heard from in this appeal. And in any event, such judicial wheel-spinning would appear to be the very thing this doctrine is designed to avoid.

441 P.2d at 790.

I would affirm the judgment of the trial court insofar as it acts in obedience to the mandate of the Eastland Court and decline to give the City an advisory opinion on matters not properly before this court.[7] I respectfully register by dissent.

ANTONIO G. CANTU
Associate Justice

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6. The first appeal was taken to this court but was subsequently transferred to the Eastland Court in November 1980 by virtue of a Supreme Court docket equalization order. The Eastland Court thus delivered an opinion we were originally obligated to deliver.

7. The City persists in its brief on appeal: "In order for the court to understand why the City is still litigating the case instead of merely bowing to the Eastland decision it is felt that the issues in the first trial and appeal should be outlined because they are not revealed by the Eastland opinion. . . ."

COURT OF APPEALS
Fourth Supreme Judicial District of Texas
San Antonio

JUDGMENT

Appeal No. 04-83-00192-CV

CITY OF SAN ANTONIO,
Appellant

v.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,
Appellee

Appeal from the 57th District Court of Bexar County

Trial Court No. 77-CI-13810

Honorable Eugene Williams, Judge Presiding

JUDGMENT

After hearing this cause and examining the record, the Court finds that the court below committed reversible error. It is therefore ORDERED that the judgment of the court below be REVERSED and RENDERED in accordance with the opinion of this Court delivered this date.

It is further ORDERED that Appellee, San Antonio Independent School District, pay all costs of appeal and this decision be certified to the trial court.

Entered this 30th day of November, 1984.

APPENDIX D

NO. 77-CI-13810

IN THE DISTRICT COURT
57TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

CITY OF SAN ANTONIO

v.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT OF DEFENDANT SAN ANTONIO INDEPENDENT SCHOOL DISTRICT

On the 14th day of January, 1983, came on to be heard the Motion for Summary Judgment filed by Defendant San Antonio Independent School District and the Cross-Motion for Summary Judgment filed by Plaintiff City of San Antonio. The San Antonio Independent School District appeared in person and by attorney Joseph E. Scuro, Jr., Nicholas and Barrerra, Inc., and announced ready for trial. The City of San Antonio appeared and was represented by Crawford Reeder, Assistant City Attorney, and announced ready for trial.

After considering the pleadings, evidence and arguments of counsel, the Court finds the following:

1. The benefits which the City of San Antonio receive from its gas and electric utility are as follows:

(a) a sum based upon the value of fixed capitals assets of the systems within the City, "as a reimbursement

for the loss of taxes which the City would receive were the systems privately owned"; commonly referred to as the in lieu of tax payment

(b) a sum sufficient to reimburse the City for the cost of gas and electric services of the systems used during the year by the City for municipal purposes and a reimbursement for the amount expended by the City during the year for additions to the street and traffic lighting system; and

(c) a sum in cash, which when added to the other payments, reimbursements and expenditures, will total an amount equal to 14 percent of the annual gross revenue of the systems.

2. That Section 48 of Article 1446c applies to the gas and electric system owned by the City of San Antonio. This finding is necessitated by the opinion of the Eastland Court of Appeals in San Antonio Ind. School Dist., et al. vs. City of San Antonio, 644 S.W.2d 917, n.r.e. (1981), which reversed the trial court's summary judgment for the City in this case and remanded the case to this court as to San Antonio Ind. School District.

3. The City of San Antonio is holding a sum of money in reserve to pay to the San Antonio Ind. School District in accordance with an Interim Payment Agreement entered into between the two entities in May, 1980. A copy of this Interim Payment Agreement is attached hereto, marked "Exhibit A" and expressly made a part hereof.

4. There are no genuine material fact issues in dispute herein and the San Antonio Ind. School District, for the reasons aforesaid, is entitled to judgment as a matter of law.

It is therefore ORDERED, ADJUDGED AND DECREED, as follows:

The City of San Antonio's motion for summary judgment is hereby denied and the San Antonio Independent School District's motion for summary judgment is hereby granted, declaring that

1. Section 48 of Article 1446c exempts the San Antonio Ind. School District from paying gas and electric utility charges to the City of San Antonio which are based upon rates which are set so as to allow the following as items of expense of the system's operation:

(a) lieu of tax payments by the utility to the City,

(b) reimbursement by the utility to the City for the latter's gas and electrical expenses and expense of additions to the City's street lighting and traffic lighting systems, and

(c) profit made by the City from the utility's operation, as that term is defined in *San Antonio Independent School Dist. v. City of San Antonio,* 550 S.W.2d 262 (Tex. 1977); although under the terms of the Trust Indenture *only part* of the payments made by the System to the City is in lieu of taxes, as set forth in Section 48. The Summary Judgment is granted solely because of the holding by the Eastland Court of Appeals.

Further, it is ORDERED that

(1) The City of San Antonio pay to the San Antonio Independent School District the sum contemplated by the Interim Payment Agreement, which is incorporated into this judgment as "Exhibit A" and

(2) All costs herein incurred are assessed against the City of San Antonio.

Signed and entered this 24th day of February, 1983.

/s/ EUGENE C. WILLIAMS
Eugene C. Williams
Judge Presiding

APPROVED AS TO FORM:

/s/ ANTHONY NICHOLAS
Anthony Nicholas
Attorney for San Antonio Ind.
School District

/s/ CRAWFORD B. REEDER
Crawford B. Reeder
Assistant City Attorney

EXHIBIT A

STATE OF TEXAS §
§
COUNTY OF BEXAR §

INTERIM PAYMENT AGREEMENT

WHEREAS: The thirteen independent school districts (to-wit: San Antonio Independent School District, Edgewood Independent School District, Harlandale Independent School District, South San Antonio Independent School District, Northeast Independent School District, Northside Independent School District, Southside Independent School District, Alamo Heights Independent School District, East Central Independent School District, Judson Independent School District, Southwest Independent School District, Somerset Independent School District, and Fort Sam Houston Independent School District) and the Bexar County Hospital District (collectively referred to herein as "Defendants") are engaged in certain litigation with the City of San Antonio (referred to herein as "City") styled *City of San Antonio v. San Antonio Independent School District, et al.*, in which the ownership of certain funds constituting a portion of Defendants' electric and gas bills is in controversy, which funds have been and are being either withheld by Defendants from their electric and gas bills payable to the City or paid under protest and deposited in certain escrow accounts, and

WHEREAS: The City obtained a district court judgment, entered December 18, 1979, against the Defendants in the above suit which awards to the City ownership of the disputed amounts in controversy including both the withheld and escrowed monies together with pre-

judgment interest at the legal rate on all such withheld sums and judgment interest on the withheld and escrowed monies from the date of judgment until payment, and which enjoins Defendants from thereafter refusing to pay their full electric and gas rates; and

WHEREAS: Defendants are in the process of appealing such judgment to the Fourth Court of Civil Appeals and could supersede such district court judgment pending appeal by filing appropriate supersedeas bond; and

WHEREAS: The parties recognize that there are benefits to the City which would accrue from present possession of the funds in controversy and from a resumption in payment by Defendants of the full amount of their electric and gas bills, pending completion of the appellate process and that there are benefits to defendants in interest saved and in avoiding the necessity for a supersedeas bond.

THEREFORE, the thirteen above-named school districts and the Bexar County Hospital District and the Ctiy of San Antonio agree as follows:

1. The City hereby waives all pre- and post-judgment interest whatsoever due or claimed to be due to it from the Defendants pursuant to the said final judgment entered on December 18, 1979, in *City of San Antonio v. San Antonio Independent School District, et al.*

2. In consideration of such waiver by the City, each of the Defendants which has withheld from gas and/or electric utility bills rendered on accounts for which it is responsible any amounts disputed under section 48 of Article 1446c, Vernon's Texas Civil Statutes, will pay the full amount of all such withheld sums to the City Public Service Board of San Antonio within thirty days from the date of receipt of a statement of such amounts from the City Public Service Board, such statement to

be sent subsequent to the execution of this agreement. The City Public Service Board shall transmit all such sums to the City after appropriate adjustment of its billing records.

3. In additional consideration of such waiver by the City, each of the Defendants will resume payment in full of the billed amounts of all electric and/or gas bills for all accounts for which each such Defendant is responsible, including the portion of such bills disputed under section 48 of Article 1446, commencing with the first electric and/or gas bill received by each Defendant (or by accounts for which it is responsible) from the City Public Service Board following the date of execution of this agreement. Defendants shall continue such full payment during the continuation of litigation of the parties' controversy pending its final adjudication.

4. In additional consideration of such waiver by the City, Defendants each agree to execute, within thirty days of the execution of this agreement, all documents necessary to release to the City Public Service Board of San Antonio the full balance in all escrow funds created by the parties as a result of the dispute relating to section 48, Article 1446c, including accumulated interest and less any escrow or trustee fees due and owing to the escrow institutions. The City Public service Board of San Antonio shall transmit all such funds to the City after appropriate adjustment of its billing records.

5. The parties agree that, in the event Defendants obtain a final judgment in their favor either in whole or in part on appeal in *City of San Antonio v. San Antonio Independent School District, et al.*, any amounts awarded to Defendants by the courts shall be payable by the City to Defendants in accordance with such judg-

ment, but Defendants hereby waive any rights they might have to any payments of interest whatsoever up to the date of said final judgment and for thirty days thereafter.

6. Resolutions passed by each of the Defendants and by the San Antonio City Council authorizing execution of this agreement by the below signed representatives of the parties are attached hereto.

THE CITY OF SAN ANTONIO

By: /s/ CRAWFORD B. REEDER
Crawford B. Reeder
First Assistant City Attorney
Attorney for Plaintiff

/s/ HARVEY L. HARDY
Harvey L. Hardy
Attorney for Defendants
Edgewood, Harlandale, South San Antonio, Northeast, Northside, Southside, Alamo Heights, East Central, Judson, Southwest, Fort Sam Houston and Somerset Independent School Districts

/s/ PETER M. TORRES
Peter M. Torres
Attorney for Defendant
San Antonio Independent School District

/s/ MICHAEL P. HODGE
Michael P. Hodge
Assistant Criminal District Attorney
Attorney for Defendant
Bexar County Hospital District

RESOLUTION

On this the 12th day of May 1980, the San Antonio Independent School District Board of Trustees meeting in regular session considered the attached Interim Payment Agreement concerning funds withheld and in escrow from the City of San Antonio and the City Public Service Board and said Board of Trustees was of the opinion that said Interim Payment Agreement should be approved,

Be it therefore RESOLVED that said Interim Payment Agreement is hereby approved and that Peter Torres, Jr., as counsel in the litigation of said disputed funds is hereby authorized to execute and approve said agreement for and in behalf of the San Antonio Independent School District.

Resolved on this 12th day of May 1980.

/s/ WM. ELIJONDO
President
Board of Trustees
San Antonio Independent
School District

Attest

/s/ BETTY ESQUVEL
Secretary

STATE OF TEXAS §
§
COUNTY OF BEXAR §

ADDENDUM TO INTERIM PAYMENT AGREEMENT

WHEREAS: The Fort Sam Houston Independent School District and the Bexar County Hospital District have continued to pay their respective portions of the disputed utility charges into escrow according to the original escrow agreement entered into by the parties; and

WHEREAS: The payment of interest on all such charges withheld by the other twelve school districts has been forgiven under the Interim Payment Agreement heretofore entered into for the period from and after September 1, 1976; and

WHEREAS: It is inconsistent with the true spirit and intent of said Interim Payment Agreement to discriminate against the Fort Sam Houston Independent School District and Bexar County Hospital District on the matter of interest on and after September 1, 1976; now, therefore

It is hereby declared by and between the City of San Antonio and the Fort Sam Houston Independent School District and the Bexar County Hospital District, acting through their respective attorneys, that it is the intent of the Interim Payment Agreement (to which this is a clarifying addendum) that upon the liquidation of the respective escrow accounts of the said Fort Sam Houston Independent School District and Bexar County Hospital District, that the City of San Antonio shall receive (pursuant to the terms and conditions of the Interim Payment

Agreement) all of the principal payments paid into the respective escrow accounts up to the time of their liquidation and all interest accumulated to the date of liquidation on principal payments made prior to September 1, 1976; and that all accumulated interest in the respective escrow accounts attributable to principal payments made on and after September 1, 1976, shall be paid respectively to the said school district and hospital district.

THE CITY OF SAN ANTONIO

By: /s/ CRAWFORD B. REEDER
Crawford B. Reeder
First Assistant City Attorney

FORT SAM HOUSTON
INDEPENDENT SCHOOL
DISTRICT

By: /s/ HARVEY L. HARDY
Harvey L. Hardy
Attorney

BEXAR COUNTY
HOSPITAL DISTRICT

By: /s/ MICHAEL P. HODGE
Michael P. Hodge
Assistant Criminal District
Attorney

Dated May 21, 1980

APPENDIX E

CLERK'S OFFICE - SUPREME COURT
Austin, Texas

January 27, 1982

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of C-423, CITY OF SAN ANTONIO v. SAN ANTONIO I.S.D. ET AL, was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

APPENDIX F

CLERK'S OFFICE - SUPREME COURT
Austin, Texas

October 21, 1981

Dear Sir:

Your are hereby notified that the Application for Writ of Error in the case of CITY OF SAN ANTONIO v. SAN ANTONIO I.S.D. ET AL No. C-423 was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

APPENDIX G

NO. 5593

APPEAL FROM BEXAR COUNTY

San Antonio Independent School District, et al.,
Appellants

v.

City of San Antonio,
Appellee

The issue is the proper construction of Section 48 of TEX. REV. CIV. STAT. ANN. art. 1446c (Vernon 1980), the "Public Utility Regulatory Act."[1] City of San Antonio sued twelve independent school districts in Bexar County, to-wit: Edgewood, Harlandale, Southside, Southwest, South San Antonio, Somerset, East Central, Judson, Fort Sam Houston, Alamo Heights, North East and Northside together with the San Antonio Independent School District and the Bexar County Hospital District for declaratory and monetary relief. All parties filed motions for summary judgment except San Antonio Independent School District. The City's motion was granted, and those of defendants were denied. The State of Texas was an intervenor. Its motion for summary judgment was denied. All defendants appeal. Intervenor, State of Texas, does not. We reverse and render in part, and reverse and remand in part.

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1. Sec. 48. No payments made in lieu of taxes by a public utility to the municipality by which it is owned may be considered an expense of operation for the purpose of determining, fixing, or regulating the rates to be charged for the provision of utility service to a school district or hospital district. No rates received by a public utility from a school district or hospital district may be used to make or to cover the cost of making payments in lieu of taxes to the municipality by which the public utility is owned.

The City of San Antonio, which owns and operates its gas and electric systems, sought recovery of certain funds constituting a portion of appellants' gas and electric rates, which appellants had either been withholding or paying into escrow accounts since 1975 on the theory that Section 48 exempts school districts and hospital districts from paying rates which "may be used to make or to cover the cost of making payments in lieu of taxes to the municipality by which the public utility is owned." San Antonio contends that Section 48 is inapplicable to it because no municipally-owned utility is a "public utility." All parties concede that there are no fact issues.

The court in Magnolia Petroleum Co. v. Walker, 83 S.W.2d 929 (Tex. 1935) expressed the rule to be applied in construing a statute as:

> No inflexible rule can be announced for the construction of statutes. However, the dominant rule to be observed is to give effect to the intention of the Legislature. Generally the intent and meaning is obtained primarily from the language of the statute. In arriving at the intent and purpose of the law, it is proper to consider the history of the subject-matter involved, the end to be attained, the mischief to be remedied, and the purposes to be accomplished. See 59 C J., § 570, p. 958. "Where, however, the language of the statute is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provisions, the duty devolves upon the court of ascertaining the true meaning. If the intentions of the Legislature cannot be discovered, it is the duty of the court to give the statute a reasonable construction, consistent with the general principles of law." 59 C. J., p. 957, § 569; Empire Gas & Fuel Co. v. State of Texas, supra.

It is undisputed that the school districts lost a large portion of their tax base when the City of San Antonio acquired the gas and electric systems. It is also undisputed that the purchase was approved by the voters, in part because of a promise to pay schools regular "in lieu of tax" payments. Therefore, in considering "the end to be attained, the mischief to be remedied and the purposes to be accomplished" by Section 48, we conclude that the legislature sought to bring some financial relief to school and hospital districts and their taxpayers where a municipality owns a utility service.

The court in Texas Bank & Trust Co. v. Austin, 280 S.W. 161 (Tex. 1926) said:

> No rule of statutory construction is more universally recognized than that which compels the courts to give some effect to every express declaration of legislative intent. The rule is clearly stated in M., K & T. Ry. Co. of Texas v. Mahaffey, 105 Tex. 398, 150 S.W. 881, citing Justice Harlan's opinion for the United States Supreme Court in Montclair v. Ramsdell, 107 U.S. 152, 2 S. Ct. 395, 27 L.Ed. 431, where it is said:
>
> > "It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed."

The City argues that Section 48 is inapplicable to it because no municipally-owned utility is a public utility. Its argument is founded on the definition of "public utility" and "utility" contained in Section 3(c)[2] and 3(o)[3]

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2. (c) The term "public utility" or "utility," when used in this Act, includes any person, corporation, river authority, cooperative corporation, or any combination thereof, other than a municipal corporation. . . .

3. (o) "Municipally-owned utility" means any utility owned, oper-

of Article 1446c, supra, and the use of the term "public utility" in Section 48. We disagree.

The plain language of Section 48 concerns public utilities owned by municipalities. By its terms Section 48 clearly applies to the City of San Antonio unless Section 48 is dependent upon the definition section of 1446c for meaning. We hold it does not. TEX. REV. CIV. STAT. ANN. art. 1446a (Vernon 1980) uses the terms "public utility" or "utility" interchangeably. It authorizes municipalities to provide such services. If the definitions, as urged by City of San Antonio, were applicable to Section 48, a public utility could not be owned by a municipality. If this be true, Section 48 would have no meaning. It would be totally void and inoperable for any purpose. We refuse to hold that the legislature has done such an absurd thing.

Although Section 48 may have some imprecise language, the intent of the legislature is clear. As stated by the court in City of Mason v. West Texas Utilities Co., 237 S.W.2d 273 (Tex. 1951):

> It is settled that the intention of the Legislature controls the language used in an act, and in construing such act the court is not necessarily confined to the literal meaning of the words used therein, and the intent rather than the strict letter of the act will control. 39 Tex.Jur., pp. 180, 181 § 95; 50 Amer. Jur., p. 232, § 240; 59 C.J., p. 964, § 593.
>
> This Court, in Gilmore v. Waples, 108 Tex. 167, 188 S.W. 1037, said: "Courts will not follow the letter of a statute when it leads away from the true intent and purpose of the Legislature and to conclu-

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ated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities.

sions inconsistent with the general purpose of the Act."

In the recent case of Texas & N. O. Ry. Co. v. Railroad Commission of Texas, 145 Tex. 541, 200 S.W.2d 626, 629, this Court, in construing the legislative act involved in that case, said that "whenever the legislative purpose is ascertained, the significance of words used may be restricted or enlarged in order to effectuate that purpose and to give the act the meaning which the lawmakers manifestly intended."

This Court, in Brazos River Conservation and Reclamation District et al v. E. P. Costello et al, 135 Tex. 307, 143 S.W.2d 577, 580, 130 A.L.R. 1220 said: "The dominant rule controlling the construction of a statute is to ascertain the intention of the legislature expressed therein. An Act should be given a fair and sensible construction, in order to carry out the purposes for which it was enacted, and not be construed in such manner as to nullify or defeat its purposes."

We further hold that the term "public utility" referred to in Section 48 is not dependent upon Section 3(c)(4) which has been held unconstitutional in Morris v. City of San Antonio, 572 S.W.2d 831 (Tex. Civ. App.—Austin 1978, no writ).

We reverse and render judgment for all defendants except San Antonio Independent School District, for whom we reverse the judgment and remand the cause since such defendant has not filed a motion for summary judgment.

/s/ RALEIGH BROWN
Raleigh Brown
Associate Justice

April 9, 1981

APPENDIX H

IN THE DISTRICT COURT

57th Judicial District, Bexar County, Texas

NO. 77-CI-13810

CITY OF SAN ANTONIO,
Plaintiff

v.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, et al.,
Defendants

FINAL JUDGMENT

On the 18th day of October, 1979, came on to be heard in the above styled and numbered cause the Motion for Summary Judgment of Plaintiff the City of San Antonio as to all Defendants and Intervenor, filed pursuant to Rule 166A, Texas Rules of Civil Procedure, the cross Motions for Summary Judgment of Defendant Bexar County Hospital District, Defendants Edgewood Independent School District, et al. (also including Harlandale Independent School District, South San Antonio Independent School District, Northeast Independent School District, Northside Independent School District, Southside Independent School District, Alamo Heights Independent School District, East Central Independent School District, Judson Independent School District, Southwest Independent School District, Somerset Independent School District, and Fort Sam Houston Independent School District) and of Third Party Intervenor the State of Texas,

all filed pursuant to Rule 166A, and came on to be heard Plaintiff City of San Antonio's Special Exceptions to the Second Amended Answer and Counterclaim of Defendant San Antonio Independent School District. All Defendants having been served and having answered and responses having been filed to the said motions for summary judgment, and the parties, after due notice of the setting, all being present by their counsel except Third Party Intervenor the State of Texas, which urged its Motion by brief only, such Motions and Special Exceptions were submitted to the Court. Plaintiff's Motion was supported by its pleadings, affidavits, exhibits, stipulation, requests for admissions and responses thereto, including responses by Defendant San Antonio Independent School District filed after the filing of Plaintiff's said Motion, and Plaintiff's Supplemental Affidavits of Roger Ibarra and Jon C. Wood, such late-filed responses and Supplemental Affidavits being considered by the Court in support of Plaintiff's Motion, and there being no objections to the form of the said Plaintiff's Motion or any of its supporting documents. The Court having read and considered all of the said motions, responses, exceptions, pleadings, stipulations, affidavits, exhibits, admissions and trial briefs and having heard oral argument of all counsel at hearings held on October 18, 1979, and October 23, 1979, is of the opinion and finds: 1) that Plaintiff's Special Exceptions to Defendant San Antonio Independent School District's Second Amended Answer and Counterclaim are well taken and should be sustained; 2) that the portion of such Defendant's Counterclaim relating to a set-off based on benefits arising from the settlement in Texas Railroad Commission Gas Utilities Docket 500 should, in the exercise of this Court's discretion, be severed from this cause because it raises issues materially different and

completely separate from those involved in the central controversy between the parties hereto, and because the resolution of such separate issues may be long delayed; 3) that there is no genuine issue as to any material fact related to the elements of Plaintiff's claim or the controversy between the parties hereto, and that the facts related to Plaintiff's claim are undisputed, 4) that the affirmative defense of estoppel alleged by Defendant San Antonio Independent School District is erroneous under the law and unsupported by proof raising any fact issue, and 5) that Plaintiff City of San Antonio is entitled to judgment as a matter of law on its Motion for Summary Judgment against all parties and to the granting of the relief prayed for; it is now, therefore, ORDERED, ADJUDGED AND DECREED,

That Plaintiff's Special Exceptions to Defendant San Antonio Independent School District's Second Amended Answer and Counterclaim are hereby sustained on grounds that Defendant, as to its alleged set-off claim, has not shown by its Pleadings that it has any vested interest in any proceeds from the Settlement in Gas Utilities Docket 500, or that any such claim is matured or liquidated as to any definite amount; and that the portion of such Counterclaim relating to San Antonio Independent School District's claim of set-off is hereby severed from this cause in the interests of justice and convenience and to avoid prejudice to the parties, at Defendant San Antonio Independent School District's cost, and it is further ordered that such cause as severed shall constitute a new and separated case having a new docket number, to-wit: No. 77-CI-13810A on the docket of this Court, and that Defendant is granted leave to amend the severed portion of its Counterclaim as to the matters

raised in Plaintiff's Special Exceptions sustained herein, in the event conditions arise which will allow such allegations to be made;

That Plaintiff the City of San Antonio's Motion for Summary Judgment filed herein is sustained and all relief prayed for by Plaintiff herein is granted, and that Plaintiff shall have and recover against all of the Defendant school districts, to-wit: San Antonio, Edgewood, Harlandale, South San Antonio, Northeast, Northside, Southside, Alamo Heights, East Central, Judson, Southwest, Somerset, and Fort Sam Houston Independent School Districts, and against the Bexar County Hospital District and the State of Texas, the following judgment:

1. It is the declaratory judgment of the Court, consistent with the determination made in *Garrett Morris, et al. v. City of San Antonio, et al.*, 572 S.W.2d 831 (Tex. Civ. App.—Austin 1978, no writ), that that portion of Section 3(c)(4) of the Texas Public Utility Regulatory Act, Article 1446c, Vernon's Texas Civil Statutes, which includes within the definition of the term "public utility" or "utility" any "municipally-owned gas or electric utility whether owned separately or in conjunction with other muncipalities operated by a board of trustees which as of May 1, 1975, was not directly appointed by the governing body of the municipality" is unconstitutional and void as a special and local law prohibited by Article III, Section 56 of the Constitution of the State of Texas and that, therefore, the Plaintiff and its electric and gas systems are not lawfully classified as a "public utility" for purposes of the said Act, but are properly classified as a "municipally-owned utility" as defined in Section 3(o) for all purposes under the Act.

2. It is the declaratory judgment of the Court that Section 48 of Article 1446c is inapplicable to Plaintiff San Antonio or its gas and electric systems;

3. It is the declaratory judgment of the Court and the Court hereby awards judgment for monetary recovery to Plaintiff City of San Antonio against all of the Defendant school districts (to-wit: San Antonio, Edgewood, Harlandale, South San Antonio, Northeast, Northside, Southside, Alamo Heights, East Central, Judson, Southwest, Somerset, and Fort Sam Houston Independent School Districts) and against Bexar County Hospital District as follows: that as the result of the foregoing determinations Plaintiff City of San Antonio is entitled to full ownership and possession of all of the funds contained in the escrow accounts established by the parties hereto as shown in the record herein in the amount reflected by the balances of such accounts as shown in part in the record herein, (to-wit: in Exhibits M-1, M-2, M-3, and M-4 to Plaintiff's Motion for Summary Judgment) such amounts being undisputed; to ownership and possession of the accrued interest earned on such accounts; and to payment by each of the twelve school districts of the accrued portions of such twelve Defendant school districts' (to-wit: San Antonio, Edgewood, Harlandale, South San Antonio, Northeast, Northside, Southside, Alamo Heights, East Central, Judson, Southwest, and Somerset Independent School Districts) billed utility accounts withheld by them under color of Section 48 of Article 1446c since approximately September 1, 1976, until date of payment, in the amounts reflected in part in the record herein (to-wit: in Exhibits M-1 and M-4 to Plaintiff's Motion for Summary Judgment) and otherwise determinable with complete accuracy

by an accounting among the parties, such amounts being undisputed, together with legal interest under Article 5069-1.03, Vernon's Texas Civil Statutes, on all such withheld sums, such interest being computed on each payment from the time each such payment would have been due and payable to Plaintiff City in the absence of this controversy (or, as appropriate, computed from a date 30 days after the time such payments would have been due and payable, for payments due after the effective date of the amendment to Article 5069-1.03, that date being August 27, 1979), together with judgment interest at the statutory judgment rate as provided in Article 5069-1.05, Vernon's Texas Civil Statutes, on all such escrowed or withheld sums awarded herein, as finally determined, from the date of this judgment until finally paid. It is ordered that the computation of the withheld sums awarded herein shall be made by the Plaintiff and communicated in writing to Defendant; Defendants may audit such computation at their expense, within thirty days from receipt of such computation. The computation as finally determined after any such audit shall be incorporated in a written report to be filed by Plaintiff with the clerk of this Court, a copy of which report shall be furnished to all parties hereto. Such report will become a part of this judgment by reference.

4. The Court, in addition, permanently enjoins each and all of the Defendant Independent School Districts (to-wit: San Antonio, Edgewood, Harlandale, South San Antonio, Northeast, Northside, Southside, Alamo Heights, East Central, Judson, Southwest, Somerset, and Fort Sam Houston Independent School Districts) and the Bexar County Hospital District from hereafter refusing, under color of Section 48, as now written, of Article 1446c, to

pay to Plaintiff City acting by and through the City Public Service Board the full amount of their billed electric and gas rates.

5. The Court finds and hereby rules that *Morris et al v. City of San Antonio et al.*, 572 S.W.2d 831 (Tex. Civ. App.—Austin 1978, no writ) is res judicata on the issue of the constitutionality of the "public utility" classification created by Section 3(c)(4) of Article 1446c, as to Third Party Intervenor the State of Texas and the Attorney General of Texas, and that said Third Party Intervenor the State of Texas and Attorney General of Texas are estopped from raising in this suit that same constitutionality issue determined against such Intervenor in *Morris v. San Antonio.*

6. The Court hereby orders that the Motions for Summary Judgment filed herein by Defendants and by Third Party Intervenor the State of Texas are overruled and denied, that all relief sought by Defendants and by Third Party Intervenor by Motion, Counterclaim or otherwise, except as granted hereinabove or severed out by this judgment, is hereby denied and judgment is hereby rendered that Defendants and Third Party Intervenor take nothing by such Counterclaims.

7. The Court taxes the costs of this suit against Defendants and Third Party Intervenor and gives judgment that Plaintiff recover its costs herein expended.

To which judgment of the Court all Defendants and Third Party Intervenor duly excepted in open court and gave notice of appeal.

RENDERED AND SIGNED this _____ day of December, 1979.

R. L. ESCHENBURG
District Judge Presiding

Approved as to form:

HARVEY L. HARDY, Esq.
Attorney for Defendants Edgewood, Harlandale, South San Antonio, Northeast, Northside, Southside, Alamo Heights, East Central, Judson, Southwest, Fort Sam Houston and Somerset Independent School Districts

PETER TORRES, Esq.
Attorney for Defendant
San Antonio Independent School District

NORRIS W. YATES, Jr.
Assistant Criminal District Attorney
Attorney for Defendant
Bexar County Hospital District

MARTHA V. TERRY
Assistant Attorney General Attorney for
Third Party Intervenor, State of Texas

/s/ W. ROGER WILSON
W. ROGER WILSON, Esq.
Attorney for Plaintiff
City of San Antonio

APPENDIX I

NO. C-3866

IN THE
SUPREME COURT OF TEXAS

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

CITY OF SAN ANTONIO,
Respondent

(Filed April 23, 1985)

PETITIONER'S MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR

To The Honorable Supreme Court Of Texas:

Now comes the San Antonio Independent School District, petitioner, and files this its motion for rehearing of its application for a writ of error, and in support thereof, would show as follows:

PRELIMINARY STATEMENT

This Court refused the school district's application for writ of error, no reversible error, in this cause on April 10, 1985. It refused the City of San Antonio's application for writ of error, no reversible error, on January 27, 1982,

in Cause No. C-423 in this Court (*City of San Antonio v. San Antonio Independent School District, et al,* 614 S.W.2d 917 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.).

In other words, this Court n.r.e.'d two cases involving exactly the same parties (including petitioner) and the same facts and issue of law—absolutely no difference—in which the respective intermedia the courts rendered diametrically opposite and totally different judgments. The two decisions of these lower courts are in irreconcilable conflict with one another.

What is a District Judge to do? The case will again go back to trial as if newly filed and find its way back to the Supreme Court, after several years, with no guidance from this Court and with no telling what bizarre result will result on a third review of these identical issues.

The respondent City has declared its intentions in this regard for all to read at page 28 of "Response to Application for Writ of Error" in this case.

The other twelve Bexar County independent school districts, armed with a final judgment in cause No. C-423, the doctrine of *res judicata,* and a "n.r.e." from this Court every bit on a part with the conflicting "n.r.e." here will, of course, fiercely resist the attempt the City will make to set aside the judgment in their favor on the basis of the "n.r.e." rendered here.

Petitioner, meanwhile, will be left uncompensated and discriminated against by virtue of this Court's rulings. The S.A.I.S.D. is as much entitled to the same relief as the other twelve districts and will have been denied such relief, and, on the basis of the two totally conflicting

"n.r.e.'s" by this Court, will have been denied the equal protection of the law by this Court, contrary to the U. S. Constitution.

This Court owes it to the concept of upholding equal justice under law to carefully reexamine this application and to rectify the injustice done by these irreconcilable decisions.

POINTS OF ERROR ON REHEARING

POINT ONE

The Court of Appeals erred in reversing the trial court's judgment because it did not follow the law of case.

POINT TWO

The Court of Appeals erred in reversing the trial court's judgment because the question of the statute's "in lieu of taxes" language was addressed by the Eastland Court in the previous appeal.

POINT THREE

The Court of Appeals erred in reversing the trial court's judgment because it did not follow the doctrines of res judicata or stare decisis.

POINT FOUR

The Court of Appeals erred in reversing trial court's judgment because it applied an erroneous interpretation of the statute's language dealing with the definition of "in lieu of taxes."

POINT FIVE

THE SUPREME COURT AND THE COURT OF APPEALS, EACH INDEPENDENTLY, HAVE DENIED PETITIONER THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT, SECTION 1, TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 19, OF THE TEXAS CONSTITUTION.

POINT SIX

The decisions of the Eastland Court of Appeals and the Fourth Court of Appeals for Bexar County, Texas, are in direct conflict with one another and cannot be reconciled with each other.

POINTS OF ERROR ONE, TWO AND THREE RESTATED

POINT ONE

The Court of Appeals erred in reversing the trial court's judgment because it did not follow the law of case.

POINT TWO

The Court of Appeals erred in reversing the trial court's judgment because the question of the statute's "in lieu of taxes" language was addressed by the Eastland Court in the previous appeal.

POINT THREE

The Court of Appeals erred in reversing the trial court's judgment because it did not follow the doctrines of res judicata or stare decisis.

STATEMENT, ARGUMENT AND AUTHORITIES

POINTS OF ERROR ONE, TWO AND THREE

It is not petitioner's intention to re-brief these points at any length. The Court is urged to re-examine the Application, pages 8-16 inclusive, and the Amicus Curiae Brief, pages 4-8 and 12-13 inclusive.

It is very plain, however, that the Court of Appeals in this case, and this Court as well, have made a grave error in confusing the opinion only (as distinct from holding, decision and judgment) of a preceding case as the only basis for determination of the "law of the case." The decision, judgment, plain implication and inescapable inference should all play a part.

When the judgment of the Eastland Court and the plain implications of its opinion are considered the law of the case is plain for all to see: Judgment for all monies at stake rendered for the other twelve school districts on the basis of their cross motion for summary judgment and a remand for this school district *only* because it did not file a motion for summary judgment. What could be plainer or more obvious to even the most casual observer!

The San Antonio court did complete violence to this settled judgment, contrary to both the law of the case and the doctrine of *res judicata,* and this Court has now aided and abetted this, but in no clear or illuminating way, by the employment of second "n.r.e."—one in each conflicting court of appeals case.

Again we ask, what is a trial court to do faced with this "Catch 22" contradiction—a contradiction perpetuated by this Court as two separate occasions?

What should constitute the correct "law of the case" rule in Texas was set out in *Hillhouse v. Allumbaugh,* 258 S.W.2d 82 (Tex. Civ. App. 11th Dist. 1953) writ ref'd n.r.e., and in *Allied Finance Company v. Shaw,* 373 S.W.2d 100 (Tex. Civ. App.—Ft. Worth 1963) writ ref'd n.r.e. (at page 106).

That those matters which were *in effect* disposed of on a prior appeal constitute the law of the case as much as ruling explicitly stated upon a subsequent trial seems to be the universal rule throughout the United States. Many of these cases are cited in the *Amicus* brief on file in this case, pages 7-8.

This Court should clarify the law pertaining to "the law of the case" in this case or point out why (if it so believes) it is not applicable here.

POINT OF ERROR FOUR RESTATED

The Court of Appeals erred in reversing trial court's judgment because it applied an erroneous interpretation of the statute's language dealing with the definition of "in lieu of taxes."

STATEMENT, ARGUMENT AND AUTHORITIES

POINT OF ERROR FOUR

Article 1446c, Sec. 48, describes the payment in controversy as being "in lieu of taxes". The indenture component in question is described as being "in lieu of *ad valorem* taxes." There is facially a considerable difference between the two, a difference which the city has never reconciled and has attempted to cover up by always referring to the *component* incorrectly as one "in lieu of

taxes." See respondent's "Response" pages 6, 7, 10, 11, 14, 15, 26, 27, 29.

The legislative history of Sec. 48, the judgment and opinion of the Eastland Court, and the action of this Court on the City's application for writ of error in 1981-1982 in cause No. C-423 all determine that the established interpretation of Section 48 is to the effect that the phrase "in lieu of taxes" comprehends all indenture components.

POINT OF ERROR FIVE RESTATED

THE SUPREME COURT AND THE COURT OF APPEALS, EACH INDEPENDENTLY, HAVE DENIED PETITIONER THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT, SECTION 1, TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 19, OF THE TEXAS CONSTITUTION.

STATEMENT, ARGUMENT AND AUTHORITIES

POINT OF ERROR FIVE

The result of the case of the "conflicting n.r.e.'s" is that this petitioner, upon the same facts, law and issues, will receive relief in only about twenty to twenty-five per cent (20-25%) of the amount of the other twelve school districts when in truth and in fact all *thirteen* districts are undeniably entitled to equal treatment in the law in this regard.

The City proposes to seek this equality by bringing suit to take away the final judgment rendered in favor of the other twelve districts *prospectively* (italics that of

Respondent's Response, page 28). This would still result in a very substantial disparity in favor of the other twelve districts—a fact which is so obvious as to require no explication.

Furthermore, how can respondent so blithely assume the total repeal of the doctrine of *res judicata* in such prospective case? The twelve districts did get a final judgment for all components as being in "lieu of tax" and have enjoyed the benefit thereof from the inception of Article 1446c to date, by virtue of the judgment rendered by the Eastland Court.

To invidiously discriminate between these Bexar County School Districts in this regard is absolutely indefensible. There is no element which supports a division of the thirteen districts into two classes in this regard, one consisting of petitioner and the other of the other twelve districts.

This Court (as well as the San Antonio Court, but particularly this Court, had denied petitioner the equal protection of the laws by this invidious discrimination without reason by refusing its application after refusing the City's application in the first case.

POINT OF ERROR NO. SIX RESTATED

The decisions of the Eastland Court of Appeals and the Fourth Court of Appeals for Bexar County, Texas, are in direct conflict with one another and cannot be reconciled with each other.

STATEMENT, ARGUMENT AND AUTHORITIES

POINT OF ERROR SIX

This point of Error is so clear that any further argument would be superfluous and an unnecessary expenditure of this Court's time and resources.

PRAYER

Wherefore, Petitioner prays that this its Motion for Rehearing on Application for Writ of Error be granted and that its application be granted and that after final hearing that judgment be rendered in its favor at respondent's costs.

Respectfully submitted,

NICHOLAS & BARRERA, INC.
424 East Nueva
San Antonio, Texas 78205
(512) 224-5811

By: /s/ JOSEPH E. SCURO, JR.
Joseph E. Scuro, Jr.
State Bar No. 17939500
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petitioner's Motion for Rehearing on Application for Writ of Error has been hand-delivered to Mr. Crawford P. Reeder, First Assistant City Attorney, San Antonio City Hall, P. O. Box 9066, San Antonio, Texas 78205, on the date with the filing hereof.

/s/ JOSEPH E. SCURO, JR.
Joseph E. Scuro, Jr.

Supreme Court, U.S.
FILED
OCT 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-453

In The
Supreme Court of the United States
October Term, 1985

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners,

vs.

CITY OF SAN ANTONIO, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

(1) Can the Eastland opinion, which did not address the question of the meaning of "payment in lieu of taxes" be law of the case on that point?

(2) Although the appellate decision appealed from by petitioner reaches a different result, for procedural reasons, than did the Eastland decision does this fact trigger the equal protection clause?

(3) Does the equal protection clause even apply to a political subdivision of the state?

LIST OF THE PARTIES

(1) San Antonio Independent School District, Petitioner
(2) City of San Antonio, Respondent

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TABLE OF AUTHORITIES

CASES:

Beck vs. Washington, 82 S.Ct. 955, 369 U.S. 541, 8 L.Ed. (2) 98	2
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Garrett Morris vs. City of San Antonio, 572 SW (2) 831, no writ	6
Pennsylvania vs. New Jersey, 426 U.S. 660, 49 L.Ed. (2) 124	2
Sorelas vs. Sheehan, 326 F(2) 490, Cert. Den. 84 S.Ct. 1334, 377 U.S. 932, 12 L.Ed. (2) 296	2

No. 85-453

In The
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October Term, 1985

SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT, ET AL.,

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vs.

CITY OF SAN ANTONIO, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The Respondents respectfully submit this their Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Texas.

CITATION TO OPINIONS BELOW

Petitioner accurately states the status of the opinions below.

———o———

JURISDICTION

The petitioner does not present a case of judicial denial of equal protection. The equal protection clause does not assure uniformity of judicial decisions or immunity from judicial error. *Beck vs. Washington,* 82 S.Ct. 955, 369 U.S. 541, 8 L.Ed. (2) 98, rehearing denied 82 S.Ct. 1575, 370 U.S. 965, 8 L.Ed. (2) 834. *Sorelas vs. Sheehan,* 326 F (2) 490, Cert. Den. 84 S.Ct. 1334, 377 U.S. 932, 12 L.Ed. (2) 296. *Delia vs. Court of Common Pleas of Cuyahoga County,* 418 F (2) 205, Cert. Den. 90 S.Ct. 174, 396 U.S. 886, 24 L.Ed. (2) 161. Furthermore, equal protection is a right vested only in persons—not in political subdivisions. *Pennsylvania vs. New Jersey,* 426 U.S. 660, 49 L.Ed. (2) 124.

———o———

STATEMENT OF THE CASE

The petitioner's recitation of the factual basis of this case, under petitioner's caption STATEMENT, is essentially correct except for a few assertions which are of little consequence. However, such recitation does not fully apprise this Honorable Court of the legal issues in the first case, in which petitioner and eleven (11) other school districts were defendants in a suit brought by respondent to collect portions of their gas and electric bills which such districts had not paid.

It is not respondent's purpose to relitigate the aforementioned case nor the one at bar, but in order that the Court may see why there is no constitutional issue here the Court really must be apprised of the issues, and thus the merits, of both the first case and the one at bar. No one, regardless of his legal acuity, can read the "Eastland Opinion" (Petitioner's Exhibit 6) and perceive therefrom the contentions of the parties in the first case, nor can anyone determine from the Eastland decision what the merits of that case were.

Two statutory issues were involved in the first case. They were:

1. Whether Art. 1446c, sec. 48 applied to the City of San Antonio and

2. What, if such provision did apply, was the meaning of the term "payment in lieu of taxes", which was part of the subject of such provision.

The First Case

Petitioner owns a gas and electric system, subject to a Trust Indenture between it and the trustees for the holders of revenue bonds issued to finance the system's acquisition.

One of the provisions of the Trust Indenture sets out a priority of payments from the system's revenues as follows:

1. Maintenance and operation of the system.
2. Payment of principal and interest on bonds.
3. Payment in lieu of ad valorem taxes to the City to compensate it for loss of taxes resulting from its purchase of the system.

4. Improvements and extensions to the system.

5. Contingency fund.

6. Reimbursement to the City for funds paid by the City to the system for City's gas and electric use.

7. A sum in cash which, when added to (3) and (6) will bring the system's total payment to the City to 14% of the gross revenues of the system.

It is undisputed that all of the system's prescribed payments to the City are authorized by state statute (Arts 1111-1118, R.C.S. of Texas).

From the above it is easy to see that there are three (3) separate components of the system's payments to the City:

1) Payment in lieu of taxes.

2) Reimbursement for City's gas and electrical expense.

3) A cash payment in addition to (1) and (2) sufficient to bring the total payment to the City to 14% of the system's gross revenues.

Not all of the system's payments to the City are in lieu of taxes.

The petitioner here and the rest of the defendants in the first trial deducted from their monthly gas and electric bills 14% thereof, what they believed was the total of such bills' amounts which was attributable to the City's gas and electric system's payments to the City in lieu of taxes. This continued for several years and the amounts deducted totalled several million dollars. Their reliance was upon Art. 1446c, Sec. 48, V.A.T.S., which reads as follows:

> No payments made in *lieu of taxes* by a *public utility* to the municipality by which it is owned may be con-

sidered an expense of operation for the purpose of determining, fixing, or regulating the rates to be charged for the provision of utility service to a school district or hospital district. No rates received by a *public utility* from a school district or hospital district may be used to make or to cover the cost of making payments *in lieu of taxes* to the municipality by which the *public utility* is owned. (Emphasis added.)

Article 1446c's definition section reads in part as follows:

Sec. 3(c) *The term "public utility" or "utility", when used in this Act, includes* any person, corporation, river authority, cooperative corporation, or a water supply or sewer service corporation, or any combination thereof, other *than a municipal corporation*, or their lessees, trustees, and receivers, now or hereafter owning or operating for compensation in this state equipment or facilities for:

(4) the transmitting, storing, distributing, selling or furnishing of potable water . . . or the collection transportation, treatment, or disposal of sewage . . . *The term "public utility" or "utility" includes any municipally owned gas or electric utility, whether owned separately or in conjunction with other municipalities, operated by a board of trustees which as of May 1, 1975 was not directly appointed by the governing body of the municipality, and does not include any other municipally owned utility unless otherwise provided in this Act.* (Emphasis added.)

(San Antonio's gas and electric utility is operated by a board of trustees which as of May 1, 1975 was not appointed by the governing body by the municipality, by virtue of a provision of the aforesaid Trust Indenture).

Sec. 3(o) "Municipally-owned utility" means any utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities.

(San Antonio's utility is owned, operated and controlled by the municipality).

Different regulations were imposed by the statute upon public utilities than those imposed upon municipally-owned utilities. San Antonio's gas and electric utility is a "municipally-owned utility" unless the above underlined Sec. 3(c)4 makes it a "public utility". That was clearly the *purpose* of the 3(c)4 definition, but the subject definition was held to be violative of Art. III, Sec. 56, *State Constitution*[1] even before this case was tried the first time and all courts in the first trial were furnished with copies of the opinion so holding. *Garrett Morris vs. City of San Antonio,* 572 SW(2) 831, no writ (cited in Petitioner's brief). The latter case also held that San Antonio's gas and electric utility was a "municipally-owned utility" for all purposes under the Act. (1446c). The Eastland Court did not disagree with the *Garrett Morris* case.

The payments made by the system to the City were characterized by the State Supreme Court in a former case between these parties as follows:

> Part of this amount is a sum to reimburse the City in lieu of ad valorem taxes that would be received if the systems were not municipally owned. And part of the amount is reimbursement of the amount expended by the City for its own electric and gas services and also for traffic and street lighting facilities. Anything further paid under this clause by the Indenture will be all gain to the City. 550 SW(2) 263-264. *San Antonio Ind. School Dist., et.al. vs. City of San Antonio.*

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(1) Art. III, Sec. 56 prohibits the passage of local and special legislation relating to the affairs of cities where a general law can be made applicable.

Now, in view of the foregoing undisputed facts, the respondent City contended that Sec. 48 cannot apply to the City because Sec. 48 applies only to "public utilities" making "payments in lieu of taxes" to the municipalities which own them. San Antonio's system is not a "public utility" under the *Garrett Morris* decision.

That simple conclusion was the thrust of the City's case from its inception and in response to it we got the Eastland opinion. (Petitioner's Brief, Appendix 6).

But there is more. The City contended alternatively in its pleading in the trial court and by way of crosspoint on appeal that if the foregoing conclusion was mistaken, for whatever reason, and that Sec. 48 *did* apply to the City such section nevertheless applied only to the *in lieu of tax* payment made by the system to the City. It did not apply to the reimbursement by the utility to the City for the latter's gas and electric expense nor did it apply to the cash payment made by the utility to the City, which payments the Supreme Court had characterized in the above language.

The Eastland opinion ignored this crosspoint. This fact was pointed out to the Eastland Court by timely filed motion for rehearing, which was summarily denied, and was pointed out to the State Supreme Court in City's Application for Writ of Error, which was denied, and in City's Motion for Rehearing on Application for Writ of Error, which was denied.

So when the Eastland Court held that Sec. 48 applied to the City in spite of the unconstitutional Sec. 3(c)4 definition and in spite of the City's being a "municipally-owned utility" it became necessary for that court to deal

with the "lieu of tax" question, which it did not do. *The case at bar was brought forward by the City, after remand by the Eastland judgment, in order that there might be a judicial pronouncement of the meaning of "payment in lieu of taxes", as that term appears in Sec. 48.*

The Case At Bar

The State Supreme Court's refusal to review the Eastland decision on the only holding it expressly made (that Art. 1446c, sec. 48 applied to respondent) would have precluded respondent from re-litigating that particular matter. However, it was felt that since the Eastland decision pronounced no holding on the question of the meaning of the term "payment in lieu of taxes" that perhaps a successful argument could be made on retrial and appeal to the effect that such decision was not law of the case on that particular point. Consequently, only the question of the meaning of the term "payment in lieu of taxes" was brought up on appeal from the trial court's judgment, after remand, against the respondent in the case at bar.

The Appeal's Court's decision in favor of the respondent is contained in Petitioner's Brief, Appendix C, and the opinions of Justices Dial and Cadena on both the inapplicability of law of the case and the meaning of the term "payment in lieu of taxes" are, it is submitted, adequate reply to petitioner's argument here that law of the case should have been applied. Petitioner's argument that res judicata arises, as to petitioner, from the Eastland decision is answered by the obvious assertion that the Eastland decision was not final as to petitioner.

It is true that one case resulted, for procedural reasons, in two (2) intermediate Appellate Court decisions,

by different courts, conflicting in result but not in express holding. The Eastland decision resulted in the school districts' which had filed motions for summary judgment being absolved of the duty of paying any portion of the amount for which respondent had sued them. But the petitioner, under the decision in the case at bar, must pay all the sums for which it was sued except the fractional equivalent of such sums as were attributable to the systems "payment in lieu of taxes" to the respondent.

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SUMMARY OF ARGUMENT

Completely aside from the authorities set forth under Jurisdiction, supra, the foregoing situation does not mean that petitioner has been denied equal protection of the law by the Appeals Court's decision herein or by the State Supreme Court's refusal to review such decision.

Although, respondent considered that the Eastland decision was incorrect in the only holding it made—i.e., that sec. 48 applied to respondent—that decision persuaded respondent to drop its claim of inapplicability on retrial involving only petitioner because respondent was concerned that such case would be held to be law of the case in spite of the patent error in that holding. After all, the State Supreme Court had clearly accepted Eastland's decision on such holding, but had not accepted Eastland's decision on the question of the meaning of "payment in lieu of taxes" because Eastland made no decision on that question.

Aside from the authorities cited under JURISDICTION to the effect that equal protection is not violated

by inconsistent judicial decisions and that political subdivisions have no right to equal protection, anyhow, respondent has been unable to locate any case involving a litigant's claiming that he was denied equal protection because another litigant received more benefit from an erroneous decision than did the complaining litigant.

The respondent should add that shortly after the Eastland decision became final as to the other school districts, the San Antonio City Council (the rate-making body) set a school district rate that did not contemplate as operating expenses *any* of the three (3) components of the payment from the system to the City. This rate has been and is being applied to the petitioner as well as to the other districts in spite of the holding of the Appeals Court herein, upheld by the State Supreme Court. In other words petitioner has been treated ratewise exactly like all the other school districts since shortly after the Eastland decision became final. (Please see Affidavit of Crawford B. Reeder, Exhibit A, attached).

It is the position of the respondent City that the effect of the State Supreme Court's refusal to review the second decision herein (San Antonio Appeals Court) is to allow gas and electric rates of respondent's utility to include allowance for recoupment of all payments by the utility to the City except payments in lieu of taxes. The City Council is preparing to adopt a new rate ordinance to effectuate this, making the same applicable to *all* school districts.

Additional litigation in the state courts is expected to result from this; but that will be the subject of another lawsuit.

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CONCLUSION

Petitioner has failed to state a denial of equal protection of the laws resulting from conflicting Appellate decisions.

Petition for Writ of Certiorari should be denied.

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY
P. O. Box 9066
San Antonio, Texas 78285
(512) 299-8940

/s/ Lowell F. Denton
LOWELL F. DENTON
City Attorney
S.B. No. 05764700

EXHIBIT A

STATE OF TEXAS)
)
COUNTY OF BEXAR)

On this day personally appeared before me, the undersigned authority, CRAWFORD B. REEDER, known to me to be the person and official whose name is signed hereto, and on his oath stated as follows:

My name is CRAWFORD B. REEDER. I am First Assistant City Attorney for the City of San Antonio and have held such position for the past ten (10) years. I have handled the case of City of San Antonio et al. vs. San Antonio Independent School District, et al., since its inception.

Shortly after the judgment of the Eastland Court of Appeals became final the rates imposed on all school districts, including the petitioner herein, for gas and electricity were reduced by elimination from such rates of allowance for the recoupment of all of the Public Service Board's payments to the City.

/s/ Crawford B. Reeder
CRAWFORD B. REEDER
First Assistant City Attorney

SWORN TO AND SUBSCRIBED this 3rd day of October, 1985.

/s/ Carol M. Knippa
CAROL M. KNIPPA, Notary Public
Bexar County, Texas

MY COMMISSION EXPIRES
11-30-89

(SEAL)